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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

AMERICAN CYANAMID COMPANY,
Petitioner,

—against—

MELAMINE CHEMICALS, INC. *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI

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QUESTIONS PRESENTED

Where the parties to an 18-year-old consent decree ask that the decree be vacated because basic changes in industry conditions have made it obsolete and anticompetitive, and the district court so finds:

(a) Must the parties make any further showing in order to obtain relief from the decree?

(b) More specifically, under those circumstances, must the court adjudicate liability issues underlying the original complaint in the case before deciding whether the motion to vacate the decree should be granted?

PARTIES TO THE PROCEEDING

The petitioner herein is the American Cyanamid Company ("Cyanamid"), the defendant in the original case, *United States* v. *American Cyanamid Company*, 60 Civ. 3857 (S.D.N.Y.).* Respondent Melamine Chemicals, Inc. ("MCI"), a company jointly owned by Ashland Oil, Inc. and First Mississippi Corporation, was not a party to the original action or the 1964 consent judgment, but was allowed to intervene in 1982 to oppose termination of the judgment. Another company, Dart Industries, Inc. ("Dart"), was also permitted to intervene in the district court but did not participate in the appeal. The United States of America was the plaintiff in the case, and is made a respondent herein pursuant to this Court's Rule 19.6.

* Pursuant to this Court's Rule 28.1, the following are non-wholly-owned subsidiaries or affiliates of Cyanamid:

Arizona Chemical Company; B. Braun-Dexon G.m.b.H.; Brewster Phosphates (a partnership); Cyanamid Fothergill Limited; Cyanamid Iberica, S.A.; Cyanamid India Limited; Cyanamid Italia S.p.A.; Cyanamid-Ketjen Katalysator B.V.; Cyanamid (Pakistan) Limited; CYRO Industries (a partnership); Cyanamid Portugal Limited; Cyanamid Taiwan Corporation; Cyanamire S.p.A.; Cyaneka S.A.; Decorative Boards (Pty) Limited; Laminate Industries (Pty) Limited; Societe Anonyme Formica; Formica Espanola S.A.; Formica Plastics Pty. Limited; Lederle (Japan) Ltd.; Lederle (Nigeria) Limited; Mitsui-Cyanamid, Ltd.; Societe des Sutures Chirurgicales Robert & Carriere—Lederle; TDF Tiofine B.V.; YuBan-Cyanamid, Inc.

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in this action on October 5, 1983.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit, Nos. 83-6041, 83-6053 (2d Cir. October 5, 1983), is reported at 719 F.2d 558. The district court rendered two decisions which are in issue, one granting intervention to MCI and Dart, and one terminating the consent judgment. These are reported at 556 F. Supp. 357 (S.D.N.Y. 1982), and 556 F. Supp. 361 (S.D.N.Y. 1983), respectively. The consent decree underlying this matter was entered on August 4, 1964 and may be found at 1964 Trade Cas. ¶ 71,166. All three opinions in the lower

courts, as well as the district court's 1983 judgment, the complaint, the 1964 decree and the Government's principal submission to the district court on the motion for termination are printed in the separately bound Appendix to this petition.

JURISDICTION

Cyanamid seeks review of the judgment of the United States Court of Appeals for the Second Circuit entered on October 5, 1983. This petition for a writ of certiorari was filed within 90 days of that date. The Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1) (1982).

CONSTITUTIONAL PROVISIONS INVOLVED

The ruling below raises issues under Article III, Section 2, of the Constitution, which limits the judicial power of the federal courts to "cases" and "controversies," and under Article II, Sections 1 and 3, which entrusts the faithful execution of the laws to the Executive Branch of the Government.

STATEMENT OF THE CASE

On August 4, 1964, the United States and Cyanamid entered into a consent decree settling a Government civil antitrust action filed in 1960. Eighteen years later those parties jointly asked the district court to terminate the decree. The district court found the decree to be obsolete, anticompetitive and not in the public interest, and it therefore granted the parties' request. On an appeal brought by a competitor of Cyanamid that had intervened in the district court proceedings, the court of appeals reversed, holding that it was error for the district court to terminate the decree without first adjudicating whether Cyanamid's 1956 acquisition of Formica Corporation violates Section 7 of the Clayton Act, as alleged in the Government's original suit.

The Original Monopolization Suit Against Cyanamid

In its 1960 civil complaint (A-87-99) the Government charged that Cyanamid had obtained an illegal monopoly over the manufacture and sale of melamine[1] in violation of Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1-2, and Section 7 of the Clayton Act, 15 U.S.C. § 18.

According to the complaint, Cyanamid was the sole seller of melamine in the United States at the time. It not only accounted for 100 percent of U.S. sales, but had 86 percent of all domestic production and 50 percent of production worldwide (A-92). The Government claimed that Cyanamid built and maintained its monopoly through its control over what was then the only commercially feasible melamine manufacturing process, one that used dicyandiamide ("dicy") as the raw material. (Cyanamid owned both the entire North American supply of dicy and all necessary patents for making melamine from dicy.) Cyanamid was further accused of dividing world markets with members of an international melamine cartel, thereby insulating the United States market from all foreign competition. Finally, the complaint alleged that Cyanamid's acquisition of the Formica Corporation, a major user of melamine, four years earlier violated Section 7 of the Clayton Act (A-95).

The 1964 Consent Decree

In August, 1964, before trial, Cyanamid and the Government settled the case by entry of the consent decree here in issue (A-68-86). Under that decree, Cyanamid agreed, among other things: to divest its principal melamine factory; to limit the amount of its own production of melamine; to make dicy available to all interested purchasers; to license its dicy-based technology; and to purchase annually from outside sources, with a preference to domestic companies, an amount of melamine equal to its previous

1. Melamine, a white crystalline powder, is used in the manufacture of numerous products, including plastic laminates, dinnerware and automotive parts.

year's usage for the manufacture of laminates in the United States (A-81).

Over the years, some of the decree provisions were fully complied with and others expired. Of those provisions that remained in effect as of 1982, all resistance to termination of the judgment focused on the mandatory purchase requirement set forth in Part XI of the decree.[2]

The Government's And Cyanamid's 1982 Request For Termination

On August 6, 1982, upon the completion of a fifteen-month investigation by the Department of Justice, the parties to the decree jointly asked the district court to terminate the remaining provisions. In explaining its reasons for supporting the motion, the Government told the district court that, "the circumstances under which the markets for melamine and melamine-containing products operate are completely different from those which obtained in the pre-complaint period."[3] Specifically, the dicy process, which was at the root of Cyanamid's alleged monopoly power, had become obsolete, thereby depriving Cyanamid of its former technological advantage over competitors. Also over the years, new competitors, including a number of highly efficient foreign suppliers, had entered the domestic market. As a result, by 1981 Cyanamid's market share had fallen from the 100 percent alleged in the complaint to a mere 11.7 percent. MCI (successor to one of the post-1964 entrants) had become the largest domestic seller with 49.2 percent of sales, while foreign suppliers accounted for the remaining 38.1 percent of the market.[4] The Government concluded, based upon these and other

2. The provisions of the decree and their status as of 1982 are summarized in the district court opinion at A-28-31.

3. Memorandum Of The United States In Response To Motion Of American Cyanamid Company To Terminate The Final Judgment Herein, filed August 6, 1982 at A-59. That document is the official statement by the Justice Department of its reasons for seeking to end the melamine decree and is reprinted in full at A-55-67.

4. Market share figures presented in the various submissions to the district court were summarized in the Response Of American Cyanamid

developments unanticipated in 1964, that the decree had become anticompetitive under present market conditions and should be terminated.

Three competitors, including MCI, opposed termination, although they advanced inconsistent theories as to the likely results of terminating the decree.[5] Two of those companies obtained leave to intervene, over the objection of Cyanamid and the Government, while the third participated as amicus curiae. The court received factual and legal submissions from the parties, the intervenors and amicus and all presented their arguments at a hearing held October 27, 1982. In an opinion issued January 10, 1983, the court vacated the decree.

The Decision Of The District Court

In considering the motion, the district court[6] recognized that the Department of Justice has "broad discretion" in controlling the course of its antitrust litigation, including consent decree matters, and that, "[a]bsent abuse of discretion, the Government's conclusion that a decree should be vacated should be given great weight" (A-39). Here, the court found, the Department had carefully examined the relevant facts and the opponents' contentions and had otherwise discharged its public interest responsibilities fully and conscientiously (A-39).

Even so, the district court declined to "rubber stamp" the Department's recommendation and made its own assessment of the likely effects of ending the decree (A-39). Based on the record before it, the court agreed that "[s]ince the Consent

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Company To Comments Opposing Termination Of The Final Judgment, filed October 25, 1982 at 14.

5. As summarized in the opinion of the district court, MCI argued that it was dependent on continuing subsidy from Cyanamid, and might leave the market absent the decree. The other two opponents of termination, makers of melamine products, argued that termination of the decree would give *MCI* monopoly power. (*See* A-34-35).

6. The matter was decided by the Honorable Charles L. Brieant of the Southern District of New York, the district judge who had administered the decree for the previous ten years and personally presided over several prior proceedings concerning its meaning and application (A-27-28).

Decree was entered, profound and complex changes have taken place in the melamine production industry" (A-31-32). Further, the court determined that the primary continuing effect of the decree was simply to force Cyanamid to subsidize MCI (A-32-34). Ending that subsidy, the court concluded, could be expected to enhance competition by causing MCI to compete more vigorously (A-39-40). Finally, the court found that aggressive competition from numerous importers assured ample supplies to all melamine users (A-38, A-40). Thus the court found no competitive justification for retaining the decree, holding:

> Where, as here, the conditions which the decree was designed to remedy no longer exist, the decree should be terminated, especially where it operates against the competitive designs of antitrust legislation.

(A-41, citations omitted).

The Decision Of The Second Circuit

In reversing the district court's decision, the court of appeals did not address the basic finding that, as a factual matter, the decree now "operates against the competitive designs" of the antitrust laws. Instead, because the single provision fastened upon by the intervenors related to the Clayton Act Section 7 claim in the Government's 1960 complaint, the Second Circuit treated the appeal as though it were from a litigated judgment on the merits in a Section 7 action. It held that the trial court had erred in vacating the consent decree without properly adjudicating whether a "Section 7 violation presently exists," based upon "the factors for analyzing the legality of a vertical merger set forth by *Brown Shoe*,[7] *Fruehauf*,[8] and other applicable cases" (A-21). On remand, the district court was directed to "determine the relevant markets and the market shares of the acquiring and acquired firms' shares in those markets" (A-18), and to apply what the Second Circuit called "the standard framework for analysis of the legality of a vertical merger" (A-19).

7. *Brown Shoe Co.* v. *United States*, 370 U.S. 294 (1962).
8. *Fruehauf Corp.* v. *FTC*, 603 F.2d 345 (2d Cir. 1979).

In part, the court of appeals found the Section 7 standard to be consistent with certain language in Part XI of the decree—a proviso for ending the purchase requirement upon a showing by Cyanamid that competition would not be injured.[9] In the main, however, the Second Circuit went out of its way to make clear that district courts should apply a substantive liability test whenever the parties agree that a decree should be terminated. The court recognized that in refusing to permit the parties to vacate the decree of their own accord, it was rejecting normal contract principles for consent decree administration, but nonetheless held that:

> it is appropriate for the court to look beyond the words of the decree itself in situations such as this, where the parties jointly seek a modification of the decree.

A-15-16. In short, it was *because* the Government and Cyanamid were in agreement that the court thought it proper to insist upon adjudication of the issues raised in the complaint as a precondition to vacating the decree.

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9. To the extent the court of appeals attempted to rest its decision on that proviso, it rejected the understanding shared by both the parties who drafted the decree and the district court charged with administering it as to what the language in question means. Part XI states in part:

> at any time after ten (10) years from [November 1964], Cyanamid may petition to this Court to be relieved from this provision, such relief to be granted upon a showing by Cyanamid to the satisfaction of this Court that the effect of such relief will not be substantially to lessen competition or tend to create a monopoly . . ..

A-81. The parties explained that they had inserted this language only to permit termination of the purchase requirement, on Cyanamid's *unilateral* application, upon a lesser showing than would otherwise be required under *United States* v. *Swift & Co.*, 286 U.S. 106 (1932). They made clear, and the district court agreed, that they did not intend this language to make it more difficult for the parties jointly to set aside the entire decree. (*See* A-34).

REASONS WHY THE WRIT SHOULD BE GRANTED

Introduction

This petition presents an extremely important federal question. The significance of the consent decree as a law enforcement tool was recognized by this Court fifty years ago in its landmark *Swift*[10] decision. Since then, the Court has decided a number of cases that provide the basic guidelines for the interpretation and enforcement of consent decrees by the district courts. Virtually all of the rules governing consent decree administration have come directly from this Court. Many of the leading consent decree decisions have been antitrust cases, but the principles articulated in those cases have been applied to decrees in all areas,[11] as will the holding of the Second Circuit below, if allowed to stand.

In *Swift*, the Court addressed the question whether, and by what standard, a defendant may unilaterally seek relief from a consent decree. Subsequently, the Court established rules to be applied where the Government seeks to modify a decree without the defendant's consent[12] and, in a series of decisions, for resolving disputes between the parties as to the meaning or scope of a consent decree.[13]

The question presented here—the standard to be applied in perhaps the most common situation in the district courts, *i.e.*, where the parties are in agreement that relief from the decree is

10. *United States* v. *Swift & Co.*, 286 U.S. 106 (1932).

11. *See, e.g., SEC* v. *Clifton*, 700 F.2d 744 (D.C. Cir. 1983) (securities law); *White* v. *Roughton*, 689 F.2d 118 (7th Cir. 1982), *cert. denied*, 103 S.Ct. 1524 (1983) (civil rights law); *Environmental Defense Fund* v. *Costle*, 636 F.2d 1229 (D.C. Cir. 1980) (environmental law); *Philadelphia Welfare Rights Org.* v. *Shapp*, 602 F.2d 1114 (3d Cir. 1979), *cert. denied sub nom., Thornburgh* v. *Philadelphia Welfare Rights Org.*, 444 U.S. 1026 (1980) (social security and welfare law); *United States Steel Corp.* v. *Fraternal Ass'n of Steel Haulers*, 601 F.2d 1269 (3d Cir. 1979) (labor law).

12. *Ford Motor Co.* v. *United States*, 335 U.S. 303 (1948); *Chrysler Corp.* v. *United States*, 316 U.S. 556 (1942).

13. *United States* v. *ITT Continental Baking Co.*, 420 U.S. 223 (1975); *United States* v. *Armour & Co.*, 402 U.S. 673 (1971); *United States* v. *Atlantic Refining Co.*, 360 U.S. 19 (1959); *Hughes* v. *United States*, 342 U.S. 353 (1952).

needed—has not yet been addressed by this Court. The purported solution offered by the Second Circuit, however, drastically changes long-standing principles of consent decree administration in a way that cannot be reconciled with this Court's prior decisions.

I

The Decision Below Affects All Consent Decrees And Prejudices The Rights Of All Consent Decree Parties.

This Court needs no reminder that the consent decree has become a widely-used law enforcement mechanism, not only in the antitrust field, but in the law of taxation, land and natural resource management, civil rights and securities regulation, among others. Thousands of decrees are now on the dockets of the federal courts, and, while statistics are not available for every law enforcement agency, it is well known that nearly ninety percent of all judgments obtained over the years by the Antitrust Division of the Department of Justice were entered on consent. The same is true for actions brought by the Securities and Exchange Commission.[14] Any change in the way consent decrees are to be administered will necessarily have far ranging effects.

A. The Decision Fundamentally Changes Prior Consent Decree Practice.

Over the years, the federal courts have processed and granted "literally hundreds" (A-63 n.1) of joint requests for modification or termination of antitrust consent decrees. The Second Circuit's ruling, directing the district courts to adjudicate liability issues as in a litigated case, sharply conflicts with prior practice in such matters, which recognized that the consensual nature of the

14. For securities cases see *SEC* v. *Clifton*, 700 F.2d 744, 748 (D.C. Cir. 1983). For antitrust consent decrees see 949 ANTITRUST & TRADE REG. REP. (BNA) F1, F2, F8 (January 31, 1980). In the antitrust area alone, it has been stated that there are approximately 1,300 Government consent decrees currently in force. Statement of William F. Baxter, Assistant Attorney General, Antitrust Division, Before the Subcommittee on Monopolies and Commercial Law, Committee on the Judiciary, United States House of Representatives, March 10, 1983 at 15.

proceedings made adjudication inappropriate. Just the day before the Second Circuit's decision came down, another court of appeals ruled that, because the district court's role in consent decrees is "fundamentally different from its duty in trying a case on the merits," it would be improper to condition modification of a decree on "detailed findings that the Act had been violated in various ways." *Citizens For A Better Environment* v. *Gorsuch*, 718 F.2d 1117, 1125 (D.C. Cir. 1983). That court stressed that, "it is precisely the desire to avoid a protracted examination of the parties' legal rights which underlies consent decrees." *Id.* at 1126.

No different approach has ever been proposed for consent decrees in the antitrust area, and Congress specifically rejected any such notion when it imposed procedures for approving new decrees under the Antitrust Procedures and Penalties Act.[15] The legislative history of that Act makes clear that the courts are not to engage in substantive proceedings that are inconsistent with the nature and purpose of the consent decree as a settlement device.[16] Cases under the APPA have limited the courts' public interest inquiry accordingly:

> The balancing of competing social and political interests affected by a proposed antitrust consent decree must be left, in the first instance, to the discretion of the Attorney General. . . . The court's role in protecting the public interest is one of insuring that the government has not breached its duty to the public in consenting to the decree. The court is required to determine not whether a particular decree is the one that will best serve society, but whether the settlement is "within the reaches of the public interest." . . . More elaborate requirements might undermine the effectiveness of antitrust enforcement by consent decree.

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15. 15 U.S.C. §§ 16(b-h) (1982) (hereinafter referred to as the "APPA").

16. *See* H.R. Rep. No. 1463, 93d Cong., 2d Sess. 8 (1974); S. Rep. No. 298, 93d Cong., 1st Sess. 6-7 (1973).

United States v. *Bechtel Corp.*, 648 F.2d 660, 666 (9th Cir.), *cert. denied*, 454 U.S. 1083 (1981) (citations omitted).[17]

Where, as here, consent decree parties have jointly sought modification or termination of an existing decree, the courts have previously taken an approach similar to the one followed under the APPA and by the district court in this case: they have limited their role to ascertaining that there was a rational basis for the parties' request, and, in Government cases, that the Department of Justice had fulfilled its responsibility to represent the public in good faith.[18]

Although the Second Circuit acknowledged that the APPA "provides useful guidance to the courts in deciding how modification procedures should be addressed" (A-16 n.7), it ignored both the APPA public interest standard and cases applying a like standard to joint requests for modification or termination. It approached the question from an entirely different direction, focusing exclusively on issues of substantive liability and creating a greatly enlarged and totally unprecedented role for the courts.

Legal commentators have already begun to recognize the significance of this departure:

> The Second Circuit's reversal and remand to the lower court to reconsider the decree termination in light of

17. *Accord, e.g., United States* v. *Agri-Mark, Inc.*, 512 F. Supp. 737 (D. Vt. 1981) (court function "not to determine whether this is best possible settlement"); *United States* v. *Carrols Dev. Corp.*, 454 F. Supp. 1215 (N.D.N.Y. 1978) (not court's duty to obtain "best possible settlement"); *United States* v. *National Broadcasting Co.*, 449 F. Supp. 1127 (C.D. Cal. 1978) (parties must show only "an acceptable result"); *United States* v. *Gillette Co.*, 406 F. Supp. 713 (D. Mass. 1975) ("Court cannot provide the best of all possible worlds"); *United States* v. *Associated Milk Producers*, 394 F. Supp. 29 (W.D. Mo. 1975), *aff'd*, 534 F.2d 113 (8th Cir.), *cert. denied sub. nom., National Farmers Org.* v. *United States*, 429 U.S. 940 (1976) (court must "accommodate a balancing of interests").

18. *See, e.g., United States* v. *American Brands, Inc.*, 1983-1 Trade Cas. ¶ 65,276 (S.D.N.Y. 1983); *United States* v. *General Motors Corp.*, 1983-2 Trade Cas. ¶ 65,614 (N.D. Ill. 1983); *United States* v. *Owens-Corning Fiberglass Corp.*, 1983-1 Trade Cas. ¶ 65,247 (N.D. Ohio, 1982); *United States* v. *Swift & Co.*, 1983-1 Trade Cas. ¶ 65,250 (N.D. Ill. 1980); *United States* v. *General Electric Co.*, 1977-2 Trade Cas. ¶ 61,659 (E.D. Pa. 1977); *United States* v. *Swift & Co.*, 1975-1 Trade Cas. ¶ 60,201 (N.D. Ill. 1975).

> existing legal precedent carries additional significance because it establishes a strong judicial role in reviewing petitions to terminate consent decrees. . . . [T]he district court saw its function as determining only whether [the] public interest was served. *The Second Circuit envisioned a much greater judicial responsibility: consideration of whether the decree's purpose, derived from the language of the decree, the complaint that precipitated the decree, and the statute that gave rise to the complaint, had been fulfilled.* After *American Cyanamid*, this determination must be made by the court independent of government assertions and assurances.[19]

In the remaining portions of this petition we show that this new approach is grossly unfair to consent decree defendants, totally unsuitable as a basis for handling this or any other consent decree question and flatly contrary to Supreme Court precedent.

B. The Ruling Of The Second Circuit Undercuts The Advantages Of Consent Decree Settlements.

In insisting upon formal adjudication of liability issues, the Second Circuit ruling eliminates one of the traditional advantages of consent decree settlement: the flexibility, where the other party agrees, to adjust or eliminate the terms of the settlement agreement as conditions change. The importance of that flexibility is established by the hundreds of decrees that have been changed or terminated on consent over the years, including many landmark antitrust decrees.[20] The melamine decree itself was modified on three prior occasions, with Government consent, to accommodate market and technological developments (A-27-28). Reducing this flexibility, as the adjudicative standard imposed by the Second Circuit obviously does, can only increase the burdens on the Government and the courts in dealing with

---

19. Axinn and Stoll, *U.S. v. American Cyanamid—Consent Decree Modification Standards*, 190 N.Y.L.J. 93 (1983) 1, col. 1, at 30, col. 3 (emphasis added). For another commentary predicting that the Second Circuit's decision will have a "significant impact" on consent decree modification standards, see Nelson, *Court Complicates DOJ Modification of Antitrust Decree*, Legal Times, October 31, 1983, 1, col. 2.

20. For a partial survey of the large number of modifications and terminations of antitrust consent decrees, see 4 TRADE REG. REP. (CCH) ¶ 45,070 (1983).

antiquated decrees, and discourage future defendants from entering into long-term settlement obligations.

That the approach of the Second Circuit also inflicts real injustice on current consent decree defendants is well illustrated by Cyanamid's experience in this case. When Cyanamid, after operating for some years under a decree that had become obsolete and punitive, decided to seek an end to its strictures, it followed normal procedures and took its case first to the Department of Justice rather than moving for relief directly in court. The Department's Antitrust Division investigated the matter for fifteen months, during which it analyzed industry changes, canvassed the views of many other firms, and made repeated requests for information and documentation from Cyanamid before agreeing to support termination of the decree.[21]

Despite this record, the court of appeals has now held that the investigatory work and good faith recommendation of the Department of Justice—not to mention the substantial efforts already invested by the district judge—are irrelevant. It has remanded for Cyanamid to litigate, in effect, a private Section 7 claim maintained by its largest competitor as the sole avenue of release from the Government decree. It is hard to imagine a more prejudicial or unexpected transformation of the settlement contract than for the court to strip the Government of control of its side of the bargain and allow a non-party competitor to become the enforcer of the decree. Unless this Court intervenes, every consent decree defendant faces the risk that someday its settlement with the Government will be turned by unforeseen adversaries into a weapon of private commercial advantage.

21. The Government's agreement was conditioned upon Cyanamid's dedicating its remaining melamine-related patents to the public, which Cyanamid has done. In addition, during the two-and-one-half years since Cyanamid first approached the Government, Cyanamid has spent many millions of dollars complying with the decree by purchasing vast quantities of unwanted and unneeded melamine from MCI. By the time Judge Brieant rendered his decision, just the storage costs for that excess inventory had reached $40,000 per month. Affidavit of Robert P. Kreahling, sworn to December 20, 1982, ¶¶ 10, 20. (*See* A-43).

II

The Parties' Agreement To End The Decree Should Limit, Not Expand, The Scope Of Judicial Inquiry.

This Court has previously observed that, "a decree, which appears by the record to have been rendered by consent, is always affirmed, *without considering the merits of the cause.*"[22] It therefore makes no sense at all to hold, as the Second Circuit has, that when the parties seek to end a decree by consent, the court should then proceed with a plenary adjudication of the merits of the original complaint. We show here that both the Constitution and this Court's prior consent decree rulings preclude such a result.

A. There Is No Genuine Case Or Controversy For The Lower Court To Decide.

The ruling of the Second Circuit, that a consent decree cannot be dissolved at the request of its signatories until the district court determines whether a violation of law "presently exists," directly contravenes the Constitutional limitation on the judicial power to adjudication of "the legal rights of litigants in actual controversies." *Valley Forge Christian College* v. *Americans United*, 454 U.S. 464, 471 (1982) (quoting *Liverpool S.S. Co.* v. *Commissioners of Emigration*, 113 U.S. 33, 39 (1885)); U.S. CONST., art. III, § 2, cl. 1.

The parties to the melamine consent decree are not in dispute with respect to, and do not wish to litigate, the issues raised by the Government's 1960 complaint. They settled that case almost twenty years ago, "without trial or adjudication of any issue of fact or law herein, and without this Final Judgment constituting evidence or an admission by either party hereto with respect to any such issue . . ." (A-68). The sole matter that has been presented to the courts is the parties' request, also by agreement, that the injunction to which they consented in 1964 come to an

22. *Swift & Co.* v. *United States*, 276 U.S. 311, 324 (1928) (quoting *Nashville, Chattanooga & St. Louis Ry.* v. *United States*, 113 U.S. 261, 266 (1885)) (emphasis added).

end. Thus, in directing the district court to rule upon antitrust issues which are not in controversy between the parties, the court of appeals has ordered a judicial inquisition that is clearly beyond the authority of Article III courts.

The willingness of intervenors to oppose termination of the decree does not remedy the case and controversy problem, for two reasons. First, "it is axiomatic that 'intervention will not be permitted to breathe life into a 'non-existent' lawsuit.'" *McClune* v. *Shamah*, 593 F.2d 482, 486 (3rd Cir. 1979) (quoting *Fuller* v. *Volk*, 351 F.2d 323, 328 (3rd Cir. 1965)). *Accord United States ex. rel. Texas Portland Cement Co.* v. *McCord*, 233 U.S. 157 (1914). Accordingly, a settlement between the original parties has been held to terminate the action and bar subsequent intervention. *Horn* v. *Eltra Corp.*, 686 F.2d 439 (6th Cir. 1982) (no intervention after settlement); *Non-Commissioned Officers Ass'n* v. *Army Times Publishing Co.*, 637 F.2d 372, *mod. on other grounds.*, 650 F.2d 83 (5th Cir. 1981) (no intervention after consent decree entered); *Black* v. *Central Motor Lines, Inc.*, 500 F.2d 407 (4th Cir. 1974) (consent judgment terminates the action for intervention purposes). Therefore, since the Clayton Act issues raised by the Government's 1960 complaint were settled in 1964, intervenors cannot now resurrect them.

A second reason why the claims of intervenors do not cure the defect in the Second Circuit's remand order is the rule that strangers to a consent decree lack standing to enforce it:

> [A] well-settled line of authority from this Court establishes that a consent decree is not enforceable directly or in collateral proceedings by those who are not parties to it . . . ."

Blue Chip Stamps v. *Manor Drug Stores*, 421 U.S. 723, 750 (1975).[23] Here, the only issue is whether the 1964 decree should continue to be enforced, and the only voices urging continued enforcement are those of non-parties to the settlement.

---

23. Citing *United States* v. *Armour & Co.*, 402 U.S. 673 (1971), and *Buckeye Coal & Ry.* v. *Hocking Valley Ry.*, 269 U.S. 42 (1925).

The Second Circuit held that this "rule against enforcement by third parties does not apply" because MCI had been allowed to intervene (A-15 n.6). That, of course, simply begs the question. The court cannot confer standing, where it otherwise would not exist, simply by granting a motion to intervene. Article III requires an active dispute between adversary parties who have the requisite standing to sue. *See generally Flast* v. *Cohen*, 392 U.S. 83 (1968). Thus, the Second Circuit's remand order commands the very type of proceeding which the rule referred to in the *Blue Chip Stamps* case forbids: one in which persons not parties to a decree are given a forum to perpetuate and enforce a public consent decree to further their private, commercial interests.[24]

B. The Judicial Role Envisioned By The Second Circuit Conflicts With The Contractual Nature Of Consent Decrees.

Because the Second Circuit's approach gives no weight to the agreement of the parties that their settlement should come to an end, it directly conflicts with the longstanding rule that consent decrees should be treated basically as contracts, "without reference" to the legal theories that prompted the complaint. *United States* v. *ITT Continental Baking Co.*, 420 U.S. 223, 237 (1975). *Accord United States* v. *Armour & Co.*, 402 U.S. 673 (1971); *United States* v. *Atlantic Refining Co.*, 360 U.S. 19 (1959); *Hughes* v. *United States*, 342 U.S. 353 (1952). The holding below cannot be squared with what this Court has termed the

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24. That result is also irreconcilable with the rule that private party intervention is improper in Government antitrust cases. *See, e.g., Sam Fox Publishing Co.* v. *United States*, 366 U.S. 683, 689 (1961); *United States* v. *Associated Milk Producers*, 543 F.2d 113 (8th Cir.), *cert. denied sub nom., National Farmers' Org.* v. *United States*, 429 U.S. 940 (1976); *United States* v. *Hartford-Empire Co.*, 573 F.2d 1 (6th Cir. 1978). The statutory scheme of the antitrust laws envisions that private parties will pursue any claims they may have exclusively in private litigation, *Sam Fox Publishing Co.* v. *United States, supra*, 366 U.S. at 689, and that "the United States . . . must alone speak for the public interest" in public antitrust litigation. *Buckeye Coal & Ry.* v. *Hocking Valley Ry., supra*, 269 U.S. at 49.

"basic import"[25] of those precedents, since it requires the district court to maintain a decree which no longer has the parties' consent solely on the basis of its underlying "purpose," as inferred from legal theories in a twenty-four-year-old complaint that were never proved applicable to the case at bar.

The Second Circuit acknowledged *Armour*'s holding that the decree itself "cannot be said to have a purpose" (A-12, quoting 402 U.S. at 681), and is only the "embodiment of the intent of the parties" (A-12), but sought to limit that rule to situations where the parties are in dispute:

> In each of those cases, a danger existed that the defendant might be penalized for conduct not prohibited by the decree. . . . Here, that danger is not present since the government is not claiming that Cyanamid is engaging in conduct in violation of the decree. Rather, the government and Cyanamid are in agreement as to the termination of the decree.
>
> When the facts of a given case do not lend themselves to easy resolution by viewing the decree as akin to a contract, courts have turned to the quasi-judicial nature of consent decrees and have resorted to equitable considerations.

A-13. Stated otherwise, the Second Circuit found this case not susceptible to "easy resolution" on a contractual basis precisely because the parties are in agreement. But that reasoning is transparently fallacious, and the court's attempt to support its ruling on the ground that a consent decree is "quasi-judicial" and in part a "judicial act" does not withstand scrutiny.

The "judicial act" theory, explicated by Justice Cardozo in the *Swift*[26] opinion, only confirmed the power of the court to modify a consent decree in the face of changed circumstances. Nothing in *Swift* (or any subsequent decision) suggests that the court can or should enforce a decree which both parties believe has outlived its

25. *United States* v. *ITT Continental Baking Co.*, *supra*, 420 U.S. at 236.

26. *United States* v. *Swift & Co.*, 286 U.S. 106 (1932).

usefulness. In fact, *Swift* itself squarely rejects the Second Circuit's unspoken premise, that the parties' consent, once given, may not be withdrawn:

> The consent is to be read as directed toward events as they then were. It was not an abandonment of the right to exact revision in the future, if revision should become necessary in adaptation to events to be.

United States v. *Swift & Co.*, *supra*, 286 U.S. at 115[27].

If revision is possible even where one party objects, it should, if anything, be more freely available when both parties agree. Under the Second Circuit's analysis, however, when the parties agree their wishes become entirely irrelevant, and the decree becomes not "quasi-judicial" but exclusively judicial. This Court should grant review to correct this misapplication of its prior decisions.

C. In a Government Case, Failure To Accord Proper Weight To The Parties' Agreement Intrudes On The Constitutional Authority Of The Executive Branch.

Cyanamid does not purport to speak for the interests of the Department of Justice. However, as explained above (pp.12-13), Cyanamid relied upon that agency's authority in proceeding as it did, and in dedicating its patents as a condition for release from the decree. The failure of the Second Circuit to accord any weight to the Government's recommendation—and it is plain from the type of proceedings required on remand that it did not—is another clear error which warrants this Court's attention.

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27. The district court emphasized this principle, stating:

> It is of course clear that an antitrust consent decree should only endure so long as, and contain only such remedial measures necessary to ensure competition. *See United States* v. *Bausch & Lomb Optical Co.*, 321 U.S. 707 (1944); *United States* v. *National Lead Co.*, 332 U.S. 319 (1947). An antitrust remedy is designed to restore competition not to punish a defendant. *United States* v. *E.I. du Pont de Nemours & Co.*, 366 U.S. 316, 326 (1961).
>
> A-41.

As stated in *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 170 (1803), it is not "the province of the court . . . to inquire how the executive, or executive officers, perform duties in which they have a discretion." This Court has long reconized that the prosecutorial discretion of the Executive Branch to control its cases, and specifically to dismiss them, continues even after judgment has been entered. *The Confiscation Cases*, 74 U.S. (7 Wall.) 454 (1868). These principles have always been applied to antitrust consent decree matters, affording the Department of Justice a degree of discretion that is completely at odds with the Second Circuit approach.[28] By making the termination of a consent decree turn on the application of substantive liability rules, the decision below denies the Department (as well as the district court) any discretion at all.

We submit that whether a consent judgment deserves continued enforcement by the Department of Justice is intrinsically a question relating to the "execution of the laws"—even more so than the entry of a new decree, which three Justices of this Court recently characterized as a matter "clearly for nonjudicial discretion." *Maryland* v. *United States*, 103 S.Ct. 1240, 1243 (1983) (Rehnquist, J., joined by Burger, C.J. and White, J. dissenting from summary affirmance of a new consent decree). *See* U.S. CONST., art. II. Accordingly, the Department's good faith determination, that further enforcement of the decree is inappropriate, should have been respected.

28. *E.g.*, *Sam Fox Publishing Co.* v. *United States*, 366 U.S. 683, 689 (1961) (court should not question Government's judgment absent "bad faith or malfeasance"); *Swift & Co.* v. *United States*, 276 U.S. 311, 332 (1928) (Attorney General's discretion over consent decrees "includes the power to make erroneous decisions as well as correct ones").

CONCLUSION

For the reasons stated herein, American Cyanamid Company respectfully requests this Court to issue a writ of certiorari to review the decision of the Court of Appeals for the Second Circuit.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

AMERICAN CYANAMID COMPANY,

Petitioner,

—against—

MELAMINE CHEMICALS, INC. *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

APPENDIX TO PETITION

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[CORRECTED COPY]

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 1237, 1455—August Term, 1982

(Argued May 12, 1983 Decided October 5, 1983)

Docket Nos. 83-6041, 83-6053

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

—v.—

AMERICAN CYANAMID CO.,

Defendant-Appellee and Cross-Appellant,

MELAMINE CHEMICALS, INC.,

Intervenor-Appellant-Cross-Appellee.

Before:

OAKES, CARDAMONE and PIERCE,

Circuit Judges.

Appeal from an order of the United States District Court for the Southern District of New York, Brieant, *Judge*), terminating a consent decree between the United States and American Cyanamid Co.

Affirmed in part; reversed and remanded in part.

RAY S. BOLZE, Washington, D.C. (Robert J. Brookhiser, Jean M. Allison, Howrey & Simon, Washingtion, D.C.; James K. Leader, Holly S. Stein, Townley & Updike, New York, New York; John C. Biehl, Ashland Oil, Inc., Ashland, Kentucky; Alfred L. Price, First Mississippi Corp., Jackson Mississippi, on the brief), *for Intervenor-Appellant-Cross Appellee*.

EDWARD T. HAND, Washington, D.C. (William F. Baxter, Assistant Attorney General, Abbott B. Lipsky, Jr., Barry Grossman, Gregory B. Hovendon, Joan S. Huggler, Department of Justice, Washington, D.C., on the brief), *for Plaintiff-Appellee*.

KENNETH E. NEWMAN, New York, New York (Peter R. Chaffetz, James L. Stengel, Donovan Leisure Newton & Irvine, New York, New York, on the brief), *for Defendant-Appellee-Cross-Appellant*.

PIERCE, *Circuit Judge*:

Melamine Chemicals, Inc. (MCI) appeals from an order of the United States District Court for the Southern District of New York, Charles L. Brieant, Judge, entered on January 25, 1983, granting the motion of the American Cyanamid Co. (Cyanamid), made with the consent of the government, to terminate all provisions of a Consent Decree entered against Cyanamid by Judge Levet on August 4, 1964, and resulting from a civil antitrust action brought by the government against Cyanamid.[1] Cyanamid cross-appeals from an order entered November 11, 1982, granting MCI and Dart Chemicals, Inc. leave to intervene permissively. At issue herein is the termination of Part XI of the decree, which compelled Cyanamid to purchase a portion of its requirements for melamine from other producers of melamine. In particular, the issues to be addressed are: (1) whether the district court erred in permitting MCI and Dart Chemicals, Inc. to intervene; (2) whether the district court erred in applying a "public interest" standard to decide whether to terminate Part XI of the decree which provided its own higher standard, simply because the government consented to the termination; and (3) having found that a phase-out for Part XI would be desirable, whether the district court erred in declining to order such a phase-out "solely for reasons of judicial impossibility." For the reasons set forth below, we hold that MCI was properly allowed to intervene, but that the district court erred in applying the "public interest" standard and in failing to devise a reasonable phase-out period.

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1 The subject district court decision is reported at 1982-83 Trade Cas. (CCH) ¶ 65,152 (S.D.N.Y. 1983).

I. FACTS

Melamine is a white, crystalline powder used in the manufacture of resins which, in turn, are used in the manufacture of high-pressure laminates such as "Formica," laminate resins, adhesives, artificial china, plastic parts for the auto industry, molding compounds, and coatings for textile and paper products. Melamine is a fungible material, with no significant difference in quality or chemical content according to plant or country of origin. MCI and Cyanamid are currently the only domestic United States producers of melamine.

Defendant-appellee-cross-appellant Cyanamid produces a wide variety of chemicals and chemical-based products, including all of the products made from melamine listed above. A portion of the melamine which it produces is used internally in the manufacture of these products, and the rest is sold by Cyanamid in the "merchant market"—i.e., to domestic producers of products containing melamine.

Intervenor-appellant-cross-appellee MCI is a melamine producer which is a joint venture between Ashland Oil, Inc.[2] and First Mississippi Corp. MCI supplies melamine to the "merchant market." MCI is not vertically integrated and therefore does not use internally any of the melamine which it produces.

Prior to 1964, dicyandiamide (Dicy) was the primary raw material from which melamine was made. Cyanamid was able to control domestic supply and price of melamine through ownership and operation of the only Dicy production plant in North America. Through its control

[2] Ashland entered the melamine market in 1966 when it acquired Fisher Chemical Co. Fisher had previously purchased Cyanamid's Willow Island melamine plant under Part IV of the consent decree here at issue.

of the United States Dicy industry, Cyanamid allegedly had become an influential member of an international cartel of melamine producers. This cartel allegedly controlled the worldwide price and supply of melamine and allocated markets, including restricting the importation of foreign melamine into the United States. Cyanamid also controlled the use of melamine technology through its Dicy and melamine-related patents.

A. *The Consent Decree*

The government filed a complaint against Cyanamid on October 5, 1960, alleging that Cyanamid had violated Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1,2 (1976) and Section 7 of the Clayton Act, 15 U.S.C. § 18 (1976). In particular, the factual allegations in the complaint were that Cyanamid was, within the period covered by the complaint, the sole producer of melamine for sale in the merchant market in the United States; that Cyanamid had conspired with six foreign and domestic companies, enabling it to exploit the advantage it derived from its exclusive control in the United States of Dicy; that it had manipulated the availability and prices of Dicy, thereby discouraging domestic melamine manufacture by others; that it had caused foreign producers to refuse to sell melamine to anyone in the United States without Cyanamid's approval; and that, in 1956, it had acquired Formica Co., a leading consumer of melamine resins, for the purpose of foreclosing others from selling melamine to Formica Co. and eliminating a substantial independent competitive factor in the manufacture of laminating resins and laminates. As a result, the complaint alleged *inter alia* that the prices of melamine and melamine-containing products were maintained at unreasonably high levels; that competition in the manufacture

of melamine and products containing melamine was lessened; that actual and potential competition in melamine was foreclosed; and that the public was deprived of an adequate supply of melamine and products containing melamine.

A settlement agreement was entered by the parties without trial or adjudication of any issue, and a final judgment was entered on August 4, 1964.[3] The final judgment, *inter alia*, required Cyanamid to divest itself within two years of one of its two melamine producing plants; to share its technology in melamine-related fields for up to ten years; to forego acquisitions in melamine-related fields for ten years and obtain government or court approval for any such acquisition in the following ten years; to limit for ten years the amount of melamine that Cyanamid could produce; and not to engage in certain acts including entering into or maintaining agency relationships with the co-conspirator companies named in the decree. At issue in this case is Part XI of the decree, which states in part:

> Cyanamid is ordered and directed to purchase annually from other producers of melamine (with the preference to United States producers) an amount of melamine equivalent to the requirements of Cyanamid for melamine for use by Cyanamid in the production of laminates in the United States provided that at any time after ten (10) years from such date, Cyanamid may petition to this Court to be relieved from this provision, such relief to be granted upon a showing by Cyanamid to the satisfaction of this Court that the effect of such relief will not be

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3 The settlement is reported at 1964 Trade Cas. (CCH) ¶ 71,166 (S.D.N.Y. 1964).

> substantially to lessen competition or tend to create a monopoly in any line of commerce in any section of the country.

Under this provision, Cyanamid was to purchase the melamine requirements for its recently acquired Formica subdivision from the merchant market. As noted by the government, the provision was designed to "deny to Formica the benefits which might accrue from vertical integration with Cyanamid and to require Formica to compete worldwide for melamine with other producers of laminates."[4] Although Cyanamid was not ordered to divest itself of Formica Co., the purchase requirement obviously was intended to prevent Cyanamid from foreclosing other suppliers from selling melamine to Formica Co.

Many provisions of the consent decree have expired or been fully satisfied since the final judgment was entered. In particular, Cyanamid divested itself of one of its melamine plants in 1964 and additionally the following provisions have expired: the ban on acquisitions, the melamine production limitations, and many of the patents subject to technology-sharing requirements. Moreover, Cyanamid and the government argue that many significant changes in the industry have occurred during the intervening years. One such change was the replacement of the Dicy-based melamine manufacturing process with a urea-based process owned and licensed by Samicarbon N.V. of the Netherlands. A second change is that Cyanamid is no longer the sole source of melamine, as MCI presently also produces melamine. Other changes in the market are discussed *infra*.

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[4] Memorandum of the United States in Opposition to the Application by American Cyanamid Company for a Protective Order to Section XI(c) of the Final Judgment, at 3 (November 14, 1974).

B. *Consent Decree Termination Proceedings*

In May, 1981, Cyanamid sought the government's consent to terminate the remaining provisions of the final judgment. Cyanamid argued that the melamine purchase provision had become an anticompetitive subsidy to MCI. The government undertook a fifteen-month investigation of the alleged changes, during which comments from interested parties were sought, and concluded that the decree itself had indeed become anticompetitive. The government proposed to give its consent if Cyanamid would dedicate certain patents to the public, and Cyanamid agreed.

On August 9, 1982, Cyanamid moved in the district court to terminate the consent decree, and on the same day the government filed a memorandum in support of Cyanamid's motion. MCI and Dart Industries, a plastic laminates producer, moved to intervene. MCI claimed that it had entered the melamine business in reliance on Part XI of the decree; since MCI's entry into the market, Cyanamid has been one of MCI's largest customers; and Cyanamid had informed MCI that if the decree were terminated, Cynamid would no longer purchase melamine from MCI. This, MCI claimed, would have a direct and substantial adverse impact upon MCI and upon MCI's customers, which compete with Cyanamid in the manufacture of melamine resins and melamine-containing products.[5] The district court held that intervention of

[5] Dart Industries, Inc. contended that termination of the decree would have an anticompetitive effect on the plastic laminates industry because it would enable Cyanamid to withdraw completely from the merchant melamine crystal market to meet its internal demands. This would allegedly allow MCI to attain a monopoly position in the merchant market, resulting in higher prices for melamine, which in turn would allow Cyanamid to "price squeeze" Dart out of the market. The district court granted Dart's motion to intervene permissively, but Dart apparently chose not to take part in this appeal.

right was inappropriate, but granted MCI's motion for permissive intervention in an order entered on November 10, 1982.

On October 27, 1982, the district court held a hearing on Cyanamid's motion to terminate the decree. In an opinion dated January 10, 1983, the court found that "profound and complex changes have taken place in the melamine production industry." 1982-83 Trade Cas. (CCH) ¶ 65,152, at 71,536. The example of such "changes" cited by the district court was that the urea process for producing melamine is now used by "virtually all" melamine producers worldwide, thus dissipating Cyanamid's control over the basic raw material for producing melamine. The court noted that currently MCI is the only producer of melamine in the United States other than Cyanamid, and thus the sole beneficiary of the purchase provision of the decree. The court then held that Cyanamid was not compelled to comply with the higher standard of proof contained in Part XI, i.e., that termination "will not . . . substantially. . . . lessen competition or tend to create a monopoly in any line of commerce in any section of the country." This standard was found to apply only if Cyanamid sought termination without the government's consent. Instead, the court held that when the government does consent, the proponent of termination need only show that termination is " 'in the public interest,' " *id.* at 71,538, *quoting United States v. Swift & Co.*, 1975-1 Trade Cas. (CCH) ¶ 60,201, at 65,702 (N.D. Ill. 1975).

Turning to the contentions of the laminate manufacturers (Dart Industries, Inc. and *amicus* Plastics Manufacturing Co. (PMC)) the court found that termination of the decree would not enable MCI to acquire a monopoly position in the merchant market, as Dart and PMC had

contended, stating that "[i]f sound economic considerations should prompt Cyanamid to withdraw from the merchant melamine market, foreign producers should be expected to compete with MCI for the merchant melamine market demand previously satisfied by Cyanamid." 1982-83 Trade Cas. (CCH) ¶ 65,152, at 71,538-39 (footnote omitted). Moreover, the court noted that vertical integration is not, in and of itself, anticompetitive and may promote efficiency and enhance competition. Vertical integration with Formica Co. was found unlikely to cause diminished competition in the plastic laminates market, since "[e]xisting law prevents Formica from reducing the price of its consumer plastic laminate products below the cost of production." *Id.* at 71,540. Thus, the court concluded that the interests of Dart and PMC do not require continuation of the decree.

Apropos the interests of MCI, the court found that termination of Part XI would not be likely to "strike a death blow to MCI, or re-establish Cyanamid as a monopolist in melamine crystals." *Id.* Rather, it was found that MCI could "overcome and replace the loss in sales attributed to the Consent Decree's termination, by actively competing against Cyanamid and the foreign suppliers in the merchant melamine market." *Id.* (footnote omitted). The court concluded that the decree should be terminated, but found that "an abrupt termination [of Part XI] will have an adverse impact on MCI of a serious nature," *id.* at 71,541, and that a phase-out would be preferable. However, the court felt that it was unable to determine the appropriate duration of a phase-out period and ordered an abrupt termination notwithstanding its conclusion that a phase-out was preferable. *Id.* at 71,542-43.

II. DISCUSSION

A. *Intervention*

We first address Cyanamid's contention on the cross-appeal that the district court erred in granting MCI's motion to intervene permissively pursuant to Fed. R. Civ. P. 24(b).

Under Rule 24(b), a district court may grant leave to intervene permissively if it determines that a United States statute creates a conditional right for the applicant to intervene and the condition is satisfied or if the applicant's claim or defense and the main action have common questions of law or fact. A district court's decision on whether leave to intervene permissively should be granted can only be overturned if it constitutes an abuse of discretion. *United States Postal Service v. Brennan*, 579 F.2d 188, 191-92 (2d Cir. 1978).

Here, after deciding that MCI could not intervene of right, the district court addressed whether permissive intervention should be allowed. Since no federal statute granting a conditional right to intervene was present, the court analyzed whether a common question of law or fact existed and whether undue delay would result. The court concluded that the applicants' claims that termination would have an anticompetitive effect on the laminates market are directly related to the ultimate questions herein, and that no undue delay would result from granting leave to intervene. Thus, permissive intervention was granted. We agree with this reasoning and do not believe that it amounted to an abuse of discretion. Thus, we affirm the district court's decision to grant MCI's petition for leave to intervene permissively.

B. *Standard for Termination of Part XI*

Appellant MCI contends that the district court applied an incorrect standard for terminating Part XI of the consent decree. In particular, appellant argues that the "public interest" standard, which the district court used, was inapplicable here because Part XI expressly stated its own standard for termination, which was that Cyanamid must demonstrate that the effect of the termination "will not be substantially to lessen competition or tend to create a monopoly." This language is nearly identical to that used in Section 7 of the Clayton Act, 15 U.S.C. § 18 (1976 & Supp. V 1981).

Consent decrees have been recognized as having attributes of both contracts and judicial acts. In *United States v. ITT Continental Baking Co.*, 420 U.S. 223, 236 n.10 (1975), the Court stated:

> While [consent decrees] are arrived at by negotiation between the parties and often admit no violation of law, they are motivated by threatened or pending litigation and must be approved by the court. . . . Because of this dual character, consent decrees are treated as contracts for some purposes but not for others.

See United States v. Armour & Co., 402 U.S. 673, 681-82 (1971).

For purposes of interpreting the meaning of a consent decree, the Supreme Court has tended to apply principles of contract law. One such principle is to treat the decree as an embodiment of the intent of the parties. This view is reasonable, since such decrees are often entered without proof of any violations and "cannot be said to have a purpose" in and of themselves; rather, "the *parties* have purposes, generally opposed to each other, and the result-

ant decree embodies as much of those opposing purposes as the respective parties have the bargaining power and skill to achieve." *Id.* (footnote omitted). Thus, the Court has observed that "the scope of a consent decree must be discerned within its four corners" and "the instrument must be construed as it is written," *id.* at 682, and "without reference to the legislation the Government originally sought to enforce but never proved applicable through litigation," *ITT Continental Baking Co.*, 420 U.S. at 237. It should be noted, however, that this doctrine was developed in cases in which the question for decision was whether the existing consent decree had been violated and the government was urging a construction of the subject consent decree which the Court held was not supported by the language of the decree. *E.g.*, *United States v. Armour & Co.*, 402 U.S. 673 (1971); *United States v. Atlantic Refining Co.*, 360 U.S. 19 (1959); *Hughes v. United States*, 342 U.S. 353 (1952). In each of those cases, a danger existed that the defendant might be penalized for conduct not prohibited by the decree. *See ITT Continental Baking Co.*, 420 U.S. at 237. Here, that danger is not present since the government is not claiming that Cyanamid is engaging in conduct in violation of the decree. Rather, the government and Cyanamid are in agreement as to the termination of the decree.

When the facts of a given case do not lend themselves to easy resolution by viewing the decree as akin to a contract, courts have turned to the quasi-judicial nature of consent decrees and have resorted to equitable considerations. For instance, in *Chrysler Corp. v. United States*, 316 U.S. 556 (1942), the Court was confronted with petitions to extend the duration of a provision in an existing decree. The provision did not expressly address the issue of extension. The Court noted that the proper

test in those circumstances was whether "the [proposed extension] served to effectuate or to thwart the basic purpose of the original consent decree." *Id.* at 562.

Chrysler may be read consistently with *Armour*, despite the reference by the former to "the basic purpose of the consent decree" and the admonition by the latter that consent decrees do not, in and of themselves, have a purpose. As noted by the Ninth Circuit in *United States v. Motor Vehicle Manufacturers Association of the United States, Inc.*, 643 F.2d 644, 650 (9th Cir. 1981) (citation omitted):

> The authority of a federal district court to adopt a consent decree comes only from the statute which the decree is intended to enforce. If there is a "purpose" to be effectuated, it is the purpose of the statute pursuant to which the government seeks relief. Within that framework, the parties strike their bargain.

Thus, when the language of a consent decree provision is not clear on its face, a court of equity may, in construing the provision, consider the purpose of the provision in the overall context of the judgment at the time the judgment was entered. Using its equitable powers, a court may modify a decree in response to changed conditions. *United States v. Swift & Co.*, 286 U.S. 106, 114 (1932).

Here, the language of the decree is quite clear. Part XI unambiguously states that "at any time after ten (10) years from [the date Cyanamid sells one of its melamine production plants] Cyanamid may petition to this Court to be relieved from this provision, such relief to be granted upon a showing by Cyanamid to the satisfaction of this Court that the effect of such relief will not be substantially to lessen competition or tend to create a

monopoly in any line of commerce in any section of the country." No provision has been made to apply a different standard where the government joins with Cyanamid in a petition to terminate the consent decree. Thus, applying the "four corners" rule of *Armour*, it would appear that the standard set forth in Part XI applies.

An argument can be made that under contract theory, Cyanamid and the Government, who are parties to the decree,[6] should be allowed to modify the decree by agreement. However, while it is generally true that contract law provides that parties to a contract may, by agreement, subsequently modify the contract without court approval, *Swift & Co.*, 1975-1 Trade Cas. (CCH) ¶ 60,201, at 65,702, this is not the case with respect to consent decrees, since modification thereof always requires court approval due to their quasi-judicial nature. Such approval would be meaningless if the court were to serve merely as a rubber stamp of modifications agreed to by the parties. Consequently, it is appropriate for the court to look beyond the words of the decree itself in

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6 Cyanamid contends that a consent decree confers no enforceable rights on a third party, even though the third party was intended to benefit by the decree, citing *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 750 (1975). However, in this instance, where the standard set forth in Part XI tracks the language of Section 7 and MCI has been granted party status as an intervenor, the rule against enforcement by third parties does not apply since, as an intervenor, MCI will be barred under the doctrines of res judicata and collateral estoppel from relitigating issues decided or which could have been raised in this action. *Boys Town, U.S.A., Inc. v. World Church*, 349 F.2d 576, 577-78 (9th Cir. 1965), *cert. denied*, 383 U.S. 910 (1966); *Federal Procedure, Lawyers Edition* § 51.207 (E. Barbre ed. 1981); 1B J. Moore, T. Currier, *Moore's Federal Practice* ¶ 0.411[1], at 1253 (1965). Its arguments under Section 7 therefore should be given full consideration by this court.

situations such as this, where the parties jointly seek a modification of the decree.[7]

In performing this quasi-judicial role, the court must, of course, consider protection of the "public interest." We note, however, that the "public interest" should be based on more than a broad and undefined criterion such as promotion of the public welfare. Rather, "the words [should] take meaning from the purposes of the regulatory legislation," *NAACP v. FPC*, 425 U.S. 662, 669 (1976)—here, the Sherman and Clayton Acts.

The government's complaint herein alleged violations of Sections 1 and 2 of the Sherman Act and Section 7 of the Clayton Act. The complaint charged that Cyanamid unlawfully allocated and monopolized the domestic and foreign markets for melamine and products containing melamine through leadership of an international cartel of melamine producers, its exclusive control and manipulation of melamine technology and Dicy, and its acquisition of Formica Co. in 1956, which was and continues to be the principal domestic user of melamine to produce lami-

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7 We note that this court's interpretation of the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(b)-(h) (1976) (Tunney Act) is consistent with this reasoning. *In re International Business Machines Corp.*, 687 F.2d 591, 600 (2d Cir. 1982). There, a panel of this court observed:

> The Tunney Act was enacted in 1974 in response to the growing number of settlements by consent decree in actions filed by the Antitrust Division of the Department of Justice. Recognizing that "[t]he entry of a consent decree is a judicial act which requires the approval of a United States district court," and fearing that courts were engaging in "judicial rubber stamping" of proposals submitted by the Justice Department, Congress determined that judicial approval should be based upon specific criteria to ensure that the settlement terms would serve the public interest.

(footnotes and citations omitted). Although, by its terms, the Tunney Act is not applicable to a termination proceeding, it provides useful guidance to the courts in deciding how modification procedures should be addressed.

nates. Had the government's allegations been proven at a trial, far more extensive relief than that prescribed in the decree would likely have been directed, e.g., divestiture is not uncommonly the appropriate relief when a Section 7 violation is proven. *Ford Motor Co. v. United States*, 405 U.S. 562, 573 (1972). Judge Brieant found that "[t]he consent decree itself was formulated so as to dissolve Cyanamid's monopoly of the United States melamine industry and encourage the entrance of new producers into the domestic melamine market." 1982-83 Trade Cas. (CCH) ¶ 65,152, at 71,535.

Within this context, it appears that the purpose of Part XI was to nullify any tendency which Cyanamid's acquisition of Formica Co. would have to lessen competition or create a monopoly. We conclude that the standard set forth in Part XI, which tracks the language of Section 7, is the appropriate standard even when we look beyond the "four corners" of the decree and consider Part XI in the context of the original allegations. Here, the "public interest" derives meaning specifically from the Clayton Act, and so, the criteria used for determining a Clayton Act violation are applicable here for determining the "public interest."

We conclude that here the result is the same under either the four corners theory or the quasi-judicial theory. As noted above, the language within the four corners of Part XI clearly indicates that the section 7 standard is applicable even if we look beyond the four corners in our quasi-judicial role.

C. *Application of Section 7 Standard*

In applying the "public interest" standard, the district court herein stated that it was implicitly giving "careful consideration [to] whether termination of the Provision

XI captive customer requirement will substantially lessen competition or tend to create a monopoly," since "[t]ermination of an antitrust Consent Decree in any industry, which may create a monopoly or lessen competition, does not serve the public interest." 1982-83 Trade Cas. (CCH) ¶ 65,152, at 71,540.

It was the intent of Congress that Section 7 of the Clayton Act should apply to vertical mergers and proscribe those which are anticompetitive. Indeed, the 1950 amendment to the Act and the legislative history of that amendment made clear that vertical mergers are covered. H.R. Rep. No. 1191, 81st Cong., 1st Sess. (1949) *reprinted in 1950 U.S. Code & Ad. News* 4293; *see United States v. E.I. du Pont de Nemours & Co.*, 353 U.S. 586, 592 (1957).

The Supreme Court and this court have provided standards for determining whether a vertical merger is violative of the Clayton Act. In *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962), the Supreme Court set forth factors to be considered by a court in determining whether a vertical merger would violate Section 7. The Court noted that "[t]he primary vice of a vertical merger or other arrangement tying a customer to a supplier is that, by foreclosing the competitors of either party from a segment of the market otherwise open to them, the arrangement may act as a " 'clog on competition' which 'deprive[s] . . . rivals of a fair opportunity to compete.' " *Id.* at 324 (citation and footnote omitted). An initial step in determining whether such foreclosure constitutes a violation of Section 7 is to determine the relevant markets and the market shares of the acquiring and acquired firms' shares in those markets. The *Brown Shoe* Court stated: "If the share of the market foreclosed is so large that it approaches monopoly proportions, the Clayton

Act will, of course, have been violated. . . . On the other hand, foreclosure of a *de minimis* share of the market will not tend 'substantially to lessen competition.' " *Id.* at 328-29. If, however, the share falls between these extremes, a number of factors must be considered, which this court summarized in *Fruehauf Corp. v. FTC*, 603 F.2d 345, 353 (2d Cir. 1979):

> [T]he nature and economic purpose of the arrangement, the likelihood and size of any market foreclosure, the extent of concentration of sellers and buyers in the industry, the capital cost required to enter the market, the market share needed by a buyer or seller to achieve a profitable level of production (sometimes referred to as "scale economy"), the existence of a trend toward vertical concentration or oligopoly in the industry, and whether the merger will eliminate potential competition by one of the merging parties.

Fruehauf added several other factors to the list as well: "the degree of market power that would be possessed by the merged enterprise and the number and strength of competing suppliers and purchasers, which might indicate whether the merger would increase the risk that prices or terms would cease to be competitive." *Id.* The *Fruehauf* court characterized this list as "the standard framework for analysis of the legality of a vertical merger." *Id.*

Here, the district court did not apply this standard framework of analysis to the case at bar in order to determine whether Part XI should be terminated. Instead, it stated that " '[c]ontemporary economic theory' recognizes that vertical integration may foster corporate efficiency and *enhance* competition in the market place," 1982-83 Trade Cas. (CCH) ¶ 65,152, at 71,539, and de-

ferred to the judgment of the Department of Justice. Thus, we do not have the benefit of an analysis of record data regarding such factors as the level of concentration, barriers to entry, scale economies, minimum efficient scale, or collusion. These are among the factors discussed in the government's 1982 merger guidelines, which can be helpful to the court in analyzing the legality of a vertical merger.[8]

The district court stated that "the Executive Branch of Government has broad discretion in controlling and determining the public's interest in Government antitrust litigation; a policy interest different from that of this Court. Absent abuse of discretion, the Government's conclusion that a decree should be vacated should be given great weight." *Id.* at 71,540 (citation omitted). The district court then found that the Department of Justice had carefully examined the contentions of the participants, and had fulfilled its obligation to represent the public interest.

While *Brown Shoe* and its progeny have been the subject of considerable criticism by academicians who believe these cases apply overly harsh standards in assessing the legality of vertical mergers,[9] these cases nonetheless continue to constitute the current state of the law as prescribed by the Supreme Court, which circuit and district courts are bound to follow.

We believe it was error to apply "contemporary economic theory" to the extent it may be distinct from precedent, and to fail to apply the standard framework of

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8 United States Department of Justice Merger Guidelines 44-52 (June 14, 1982).

9 *E.g.*, IV P. Areeda & D. Turner, *Antitrust Law* ¶¶ 1000-1019 (1980); R. Bork, *The Antitrust Paradox* 225-45 (1978); Y. Brozen, *Concentration, Mergers, and Public Policy* 402-04 (1982).

analysis, as discussed *supra*. We therefore reverse the decision of the district court insofar as it holds that "the conditions which the decree was designed to remedy no longer exist [and] the decree should be terminated," and we remand for the district court to apply the factors for analyzing the legality of a vertical merger set forth by *Brown Shoe*, *Fruehauf*, and other applicable cases, and to make findings of fact as to the current state of the melamine market and the market for products that contain melamine. The court's findings and conclusions then may be reviewed, if need be.

Upon remand, the district court may conclude that no Section 7 violation presently exists. Should this be true, and should the district court continue to believe that a phase-out would be appropriate, the court should exercise its equitable power to determine an appropriate duration for such a phase-out. As noted by the Supreme Court in *Hecht Co. v. Bowles*, 321 U.S. 321, 329 (1944): "The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it." Difficulty in rendering judgment may only rarely be a sufficient reason for a court of equity to refuse to exercise its equitable powers, and is not a sufficient reason upon the facts of this case to justify a refusal herein. Indeed, we cannot help but note that abrupt termination of Part XI without a phase-out period is in itself an exercise of equitable power.

III. CONCLUSION

For all of the reasons set forth above, we affirm the district court's grant of MCI's motion to intervene permissively, reverse the district court's ruling that a "public interest" standard for determining whether to terminate is applicable, and remand to the district court for further proceedings not inconsistent herewith.

United States District Court

SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, *Plaintiff.* —*against*— AMERICAN CYANAMID COMPANY, *Defendant.*	60 Civ. 3857 (CLB) FINAL JUDGMENT

WHEREAS Defendant American Cyanamid Company ("Cyanamid") has moved for termination of the Judgment entered herein on consent on August 4, 1964 (the "Consent Decree"); and

WHEREAS Plaintiff United States of America has recommended termination of the Consent Decree as being in the public interest; and

The motion having come before the Court on October 27, 1982 and the Court having considered the arguments and submissions in support of the motion, and those in opposition to the motion made by intervenors Melamine Chemicals Inc. and Dart Industries, Inc. and amicus curiae Plastics Manufacturing Company, and having rendered its decision herein on January 10, 1983, finding that termination of the Consent Decree is in the public interest and granting said motion;

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED: that the Consent Decree is terminated, effective January 1, 1983, and on and after that date shall be of no further force or effect, provided however that:

(1) This Judgment shall not affect the application to Cyanamid of any of the antitrust laws of the United States;

(2) This Court reserves jurisdiction over the parties to and subject matter of this action to enforce any provisions

of the Decree, including any obligation to purchase melamine under paragraph XI of the Decree, relative to any period of time prior to January 1, 1983; and

(3) Pursuant to its prior agreement with the plaintiff, Cyanamid shall dedicate to the public all unexpired patents listed in Exhibit C to the Affidavit of James I. Wyer, sworn to August 6, 1982.

The Clerk is directed to enter Final Judgment accordingly.

Dated: New York, N.Y.
January 24, 1983

So ordered:

/s/ CHARLES L. BRIEANT
U.S.D.J.

Judgment entered: January 25, 1983

RAYMOND F. BURGHARDT

United States District Court

SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,
Plaintiff.

—*against*—

AMERICAN CYANAMID COMPANY,
Defendant.

60 Civ. 3857-CLB

MEMORANDUM DECISION
[Termination of Consent Decree]

BRIEANT, J.

Pursuant to Rule 60(b)(5) and (6) of the F.R.Civ.P. and Provision XV of the Consent Decree in this civil antitrust action made August 4, 1964 by the late Hon. Richard H. Levet of this Court, defendant American Cyanamid Company ("Cyanamid"), with the consent of plaintiff United States Government ("Government"), moves to terminate all provisions of the aforesaid decree or judgment which now remain in effect.

Intervenors Melamine Chemicals Inc. ("MCI"), a producer of melamine, and Dart Industries ("Dart"), a plastic laminate producer which consumes melamine, along with *amicus curiae* Plastics Manufacturing Company, a producer of plastic laminates and melamine resins, oppose such termination, contending that an anticompetitive impact on the melamine and melamine related industries will result.

Melamine is a fine white crystalline powder which is used in the manufacture of resins which in turn are used for high-pressure laminates, such as "Formica" a well-known trade-marked product manufactured by a division of Cyanamid, as well as artificial chinaware, plastic parts for the automobile industry and coatings for textile and paper products. A study in 1982 by the United States International Trade Commission (Inv. No. 731-TA-107-Prelim. "Melamine From Brazil") reports that United States consumption of melamine resins in 1981 by end uses is estimated

as follows: high-pressure laminates, such as "Formica", 29% of the total; surface coatings, 23%; molding compounds, 16%; paper treating and paper coating, 15%; textile treating and textile coating, 5%; and other (including adhesives), 12%. Typical of the uses of high-pressure laminates are decorative countertops, furniture and cabinet panels, tabletops, and partitions in commercial buildings. More than 80% of all melamine molding compounds are consumed in the manufacture of dinnerware which varies in quality from picnic disposables to advanced products which compete with fine chinaware.

Shortly following the entry of the Consent Decree there were four domestic producers of melamine, including Cyanamid and Fisher Chemical Co., the predecessor of MCI. Now, and since 1979, there are only two domestic producers, MCI and Cyanamid. There are now 17 melamine producers outside the United States, six in Western Europe, three in Eastern Europe and the U.S.S.R., three in Japan, and one each in Brazil, India, Kuwait, Taiwan and the Republic of Korea. World production capacity in 1982, by regions, is estimated by the United States Department of Commerce as follows:

Region	Production Capacity
Western Europe	40%
Japan	23%
United States	15%
Eastern Europe and the U.S.S.R.	12%
Brazil	2%
Other countries	8%
Total	100%

Total world capacity to produce melamine increased from 886 million pounds in 1979 to 981 million pounds in 1982, or by 11%. The People's Republic of China is expected to open a melamine plant with annual capacity of 26 million pounds by the end of 1983.

Melamine is essentially a fungible intermediate chemical. There is no distinctive difference in quality or chemical content according to plant or country of origin. Its production is capital

intensive; increased put-through in an operating plant does not increase the labor costs and the chemical reaction proceeds on a continuous flow process much the same as that of an oil refinery. Such a product should be expected to sell at a competitive price having a long term relation to the marginal costs of the least efficient producer.

The complaint in this civil antitrust action was filed October 5, 1960 against Cyanamid and alleged violations of Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2, and Section 7 of the Clayton Act, 15 U.S.C. § 18. The complaint charged that Cyanamid unlawfully allocated and monopolized the foreign and domestic melamine and melamine-contained markets through its leadership of an international cartel of melamine producers, its exclusive control and manipulation of melamine technology and "Dicy," (described *infra*), and by its acquisition in 1956 of Formica, Inc., then and now the principal domestic user of melamine crystals for the production of high pressure laminates.

As a result of these alleged violations, the Government alleged that the price of melamine and melamine-contained products was unreasonably high, the available supply of melamine unreasonably low, actual competition in the melamine and melamine related industries lessened, and the potential emergence of new competitors in those industries effectively foreclosed.

The litigation was settled by entry of the Consent Decree referred to above. Since that time, the Consent Decree has been the subject of various proceedings before this Court, familiarity with which is assumed. In 1969, 1973 and 1974, the Court modified various provisions of the Consent Decree at the request of Cyanamid and with the consent of the Government. In 1975, the Government initiated criminal contempt proceedings against Cyanamid alleging that Cyanamid in 1972 had wilfully violated the Consent Decree's maximum melamine production level. This Court, after a trial found Cyanamid not guilty of a criminal contempt. *United States* v. *American Cyanamid Co.*, 1978-1 Trade Cas. ¶ 61,843 (S.D.N.Y. 1977). See also, *Stamicarbon, N.V.* v. *American Cyanamid Co.*, 506 F.2d 532 (2d Cir. 1974).

The Consent Decree itself was formulated so as to dissolve Cyanamid's monopoly of the United States melamine industry and encourage the entrance of new producers into the domestic melamine market. A brief review of its provisions may be of assistance to the reader.

The first two provisions of the Consent Decree established the Court's jurisdiction over this controversy and defined the terminology employed in the Decree. Provision III identified the parties and entities bound by the Consent Decree.

Provision IV directed Cyanamid to divest itself of its melamine plant in Willow Island, West Virginia, within two years of the entry date of the Decree. This was done, by sale to MCI's predecessor. Cyanamid was also directed to guarantee Willow Island's purchaser access to its employees, customer lists and technology for one year following the purchase of the plant. Finally, if requested by the purchaser of Willow Island, Cyanamid was required to purchase 50% of its melamine requirements in excess of its own melamine production at the prevailing market price for melamine produced in the United States for a maximum term of ten years.

Provision V of the Decree, now expired, in effect prohibited Cyanamid for a ten year period, from producing more than 30 million pounds of melamine per year in the United States or to expand its domestic production capacity beyond that amount until other domestic melamine producers increased their production capacity by 25 million pounds.[1]

Provision VI enjoins Cyanamid from: (1) entering into or maintaining an agreement to allocate or divide customers, territories or markets for the sale, manufacture or distribution of melamine or melamine-contained products; (2) eliminating, limiting

1. The Court modified this provision on three separate occasions, each time with the consent of the Government. In 1969, the Court permitted Cyanamid to build its present urea process plant in Fortier, Louisiana, in response to the technological advance, discussed beginning at [A-31] of the text, which enabled melamine to be produced more economically from the raw material urea. In 1973, and again in 1974, the Court authorized Cyanamid to increase this plant's production capacity in light of a severe temporary worldwide melamine shortage which occurred in those years.

or restraining competition in these products; (3) limiting or restraining the importation or exportation of these products; and (4) refusing to do business with any person engaged in the sale, use or manufacture of melamine or melamine-contained products. This provision is still in effect.

Provision VII prohibits Cyanamid from: (1) referring melamine business to any company identified as a co-conspirator in the original complaint, or to any other company in the melamine business; (2) from entering into an agency or distributorship relationship with any such company; or (3) from attempting to prevent or restrict any company from entering or participating in the melamine business. At present, this provision is arguably obsolete, at least as to domestic producers, since the named co-conspirators and the then existing melamine producing companies are no longer involved in melamine production.

Provision VIII currently prohibits Cyanamid from refusing to sell melamine to any individual willing and financially able to pay the going market price and forbids Cyanamid from establishing price differentials between Dicy and Melamine for the purpose of, or which would result in, restraining trade in melamine or melamine resins in the United States. This latter provision is now technologically obsolete. See *infra*, [A-31].

Provision IX is still operative and orders Cyanamid to grant to any party so requesting, a nonexclusive, unrestricted license under all its existing urea, Dicy and melamine patents and to all future patents concerning the production, use and sale of melamine resin. This provision also regulated Cyanamid's acquisition of any new patents for a five year period which expired in August of 1969.

Provision X directed Cyanamid for a ten year period to furnish, upon request, all its technical information relating to the commercial manufacture of Dicy, melamine and melamine resins. This provision has been fully complied with and expired in 1974.

Provision XI, the sole present source of discord in this litigation, appears by its terms to operate in perpetuity, subject only to

defeasance after ten years upon application to the Court as therein contemplated. It reads in relevant part as follows:

> "(A) ... Cyanamid is ordered and directed to purchase annually from other producers of melamine (with the preference to United States producers) an amount of melamine equivalent to the requirements of Cyanamid for melamine for use by Cyanamid in the production of laminates in the United States provided that at any time after ten (10) years from such date, Cyanamid may petition to this Court to be relieved from this provision, such relief to be granted upon a showing by Cyanamid to the satisfaction of this Court that the effect of such relief will not be substantially to lessen competition or tend to create a monopoly in any line of commerce in any section of the country. Cyanamid's requirements for the purposes of this Section XI shall be deemed to be an amount of melamine of all grades, but not superior to that customarily used by Cyanamid in the manufacture of laminates, at least equivalent to the amount of such melamine used by Cyanamid in its production of laminates during the preceding calendar year.
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> (C) In the event Cyanamid considers that the melamine price offered for its purchase pursuant to subsection (A) hereof is oppressively high, Cyanamid may apply to the Court, and upon a showing by Cyanamid to the satisfaction of this Court that the price is non-competitive, the Court may grant such protective order as the Court deems appropriate."

Provision XII required Cyanamid to publish notice of the final consent judgment and its obligations thereunder.

Provision XIII, presently in effect through 1984, prohibits Cyanamid from acquiring certain melamine-related businesses within North America without the consent of the Government or permission of the Court. However, Cyanamid may acquire melamine-related businesses located outside North America following prompt notice to the Government.

Provision XIV authorizes the Government, upon written request and reasonable notice, to examine Cyanamid's books and records in order to secure its compliance with the Consent Decree.

Finally, by Provision XV the Court retains jurisdiction in order to enable Cyanamid and the Government to seek enforcement, modification of termination of the Consent Decree's provisions.

Since the Consent Decree was entered, profound and complex changes have taken place in the melamine production industry.

There are now two basic commercial processes for producing melamine: (1) the urea process; and (2) the Dicyandiamide or "Dicy" process. In 1964 there was only one process, that using "Dicy." Today, virtually all melamine produced worldwide utilizes the newer and more economical urea process. The advantages of the urea process include lower production costs, more readily available raw materials and recyclable byproducts. A third process using hydrogen cyanide has been patented but not used. Both domestic producers of melamine now employ the urea-based technology licensed from Stamicarbon N.V. of the Netherlands.

The Stamicarbon process is most economical when used in conjunction with urea manufacture, permitting the off gases to be recycled. With the recycle step (which both U.S. producers employ), the quantity of urea necessary to produce one pound of melamine is reduced by about 50%. The melamine vapor is separated, cooled to a liquid, filtered, recovered by crystallization, centrifuged, dried, pulverized and stored for shipment.

However, before the Stamicarbon process came on stream, and prior to the commencement of this lawsuit, melamine was produced solely from Dicy. Cyanamid controlled the domestic price and supply of Dicy through the ownership and operation of the only Dicy production plant located in North America. By virtue of its dominance of the domestic Dicy industry, Cyanamid allegedly became an influential member of an international cartel of melamine producers, which controlled the worldwide price and supply of melamine, and allegedly allocated markets, restricting the importation of foreign melamine into the United States. In

addition, Cyanamid controlled the publication and use of melamine technology through its numerous Dicy and melamine related patents. Finally, in 1956, Cyanamid acquired Formica, Inc., the leading producer of plastic laminates and a substantial consumer of melamine, thereby obtaining the questionable benefits of vertical integration.

Cyanamid and the Government now contend that the surviving provisions of the Consent Decree should be terminated since it is no longer required to ensure a competitive melamine market. They assert that fundamental changes in the industry, specifically the industry's conversion from Dicy based melamine production to the use of urea as a feedstock to produce melamine and the emergence of non-cartelized foreign competitors as an alternative source of competitive melamine supply for the United States market, considered in light of the attendant decline of Cyanamid's share of the domestic merchant market, warrant termination of the Consent Decree.[2]

The source of dispute in this litigation is so much of the agreement between the Government and Cyanamid which would terminate Provision XI of the Consent Decree, quoted *supra*, [A-30], providing for compulsory purchase of melamine by Cyanamid on the merchant market for its Formica division. No opposition has been raised against termination of the remaining portions of the Decree. Accordingly, since it appears obvious that the remaining portions of the Consent Decree should be terminated, and because the Government consents thereto, we will confine our discussion to Provision XI.

Since MCI is now the only other producer of melamine in the United States, it is now the sole beneficiary of the requirement that Cyanamid make annual purchases in amounts equal to Formica's requirements for plastic laminate production in the preceding year. It receives substantial revenue and has been able

2. As used herein, the merchant market comprises all sales in the United States of melamine in its crystal or powdered form for use as a raw material by the vendee, which sales are arms-length transactions between unrelated parties. It does not include "sales" by Cyanamid to any of its operating divisions or profit centers.

to achieve considerable corporate growth as a result of this semi-captive customer.[3] However, Dart and the *amicus* also assert that they enjoy a continuing and direct benefit from this provision of the Consent Decree. See *infra*, [A-34], *et seq.*

The Government and Cyanamid now assert that Provision XI operates against the public interest and contrary to antitrust policy because it increases Cyanamid's cost of doing business unjustifiably, thereby increasing the consumer price of Cyanamid's Formica products. The Government contends that, at best, Provision XI now operates merely as a transfer of profits from Cyanamid to MCI, and that MCI, now the largest domestic melamine

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3. It seems apparent that the course of dealing between Cyanamid and MCI has resulted in the purchase by Cyanamid from MCI of melamine at premium, full list, or non-discounted prices. Under the Consent Decree, Cyanamid is not required to prefer United States producers of which MCI is now the only one, if there is a significant price differential, and also may apply to the Court under Provision XI (C) for relief if the domestic melamine is regarded as priced "oppressively high." This latter Provision XI (C) has never been availed of by Cyanamid. The only practical limitation on MCI's price is that created by the competing merchant sales of Cyanamid itself, and the importers of foreign melamine.

Cyanamid argues that MCI has limited Cyanamid's access to foreign melamine by an aggressive policy of filing complaints with the United States International Trade Commission of the Department of Commerce, charging that it is being injured by imports of melamine from foreign countries sold at less than fair value ("LTFV"). There was nothing inappropriate about MCI's activities in this regard. It did succeed in obtaining a finding of fact from the Commission that Japan was selling melamine in the United States at LTFV. See "Melamine in Crystal Form from Japan" (Inv. No. AA-1921-162) U. S. ITC Publication 796, December 1976. A dumping order concerning melamine from Japan was published on February 2, 1977. 42 Fed. Reg. 6866. No imports of melamine have come from Japan to the United States since then.

MCI also attacked melamine imported from the Netherlands, Austria, Italy and Brazil, on the same grounds, precipitating separate investigations with respect to each. In none of these proceedings was MCI successful in persuading the Commission that melamine was being sold in the United States at LTFV. There is no doubt that the expense of defending such proceedings tends to chill the ardor of potential importers of melamine. However, the Court must assume that the proceedings were decided correctly, and that MCI was within its rights in filing them. As noted, Cyanamid has never availed itself of Provision XI (C) of the Decree.

producer, should no longer require continued benefit from the Decree.

Cyanamid and the Government contend, and the Court agrees, that since the Government has consented to termination, Cyanamid need only show the Court that termination is in the public interest.

The intervenors now contend that, in order to justify termination, Cyanamid must comply with the higher standard of proof contained in Provision XI of the Consent Decree and show that termination "will not . . . substantially . . . lessen competition or tend to create a monopoly in any line of commerce in any section of the country." This Court rejects that contention. Provision XI represents an alternative basis or evidentiary standard adopted by the parties with the consent of the Court, by which the Decree could be vacated or modified after a hearing, without the consent of the Government. It is clear that where the Government does not consent to termination or modification of an antitrust consent judgment, the proponent of termination must show that the market changes said to justify termination "are so important, that [the] dangers, once substantial, have become attenuated to a shadow." *United States* v. *Swift & Co.*, 286 U.S. 107, 117 (1931).

However, where as here the Government *consents* to the proposed termination, the proponent of termination need show merely that termination of the Decree is "in the public's interest." *United States* v. *Swift & Co.*, 1975-1 Trade Cas. ¶ 60,201, [at] 65,702 (N.D. Ill. 1975); see also *United States* v. *General Electric Co.*, 1977-2 Trade Cas. ¶ 61,659, [at] 72,717 (E.D. Pa. 1977).

The position of the intervenor parties on the subject of termination of Provision XI are different. MCI contends that the semi-compulsory annual sales it makes to the Formica division of Cyanamid pursuant to Provision XI are vital to its continued existence, and that termination of the Consent Decree will end these sales and effectively force it out of business. This "will substantially lessen competition and . . . tend to create a monopoly

[in Cyanamid]." (MCI's Memorandum in Opposition to Cyanamid's Motion to Terminate, p. 3).

Dart's analysis and that of the *amicus* Plastics Manufacturing Company ("PMC") are affected by their position as users of melamine crystals. Dart, through its Ralph Wilson Plastics Division, produces plastic laminates from melamine crystals in principal competition with Cyanamid's Formica division. Producers and users of plastic laminates such as Dart and the *amicus* PMC are directly affected by any change in supply, demand or price in melamine crystal merchant market. Since Cyanamid and MCI are now the only domestic suppliers of melamine crystals, Dart and PMC contend that termination of the Consent Decree will have an anticompetitive impact on the plastic laminate industry. They contend this is so because its own perceived economic self-interest will cause Cyanamid to withdraw completely from the melamine crystal merchant market, so as to be able to use its entire melamine production capacity internally to meet the production demands of its Formica division. Dart and PMC also claim that foreign melamine producers are not reliable sources for melamine crystals and have little competitive influence on the domestic market.[4]

As a result of Cyanamid's assumed or supposed intention to withdraw from the merchant melamine crystal market, and the claimed absence of reliable and adequate foreign suppliers, Dart alleges that *MCI* will inherit a monopolistic position in the merchant melamine crystal market. Melamine resin producers, on whom Dart and PMC rely, will be forced, it is said, "to pay monopolistic, anti-competitive prices for raw and intermediate materials [melamine crystals]." (Affidavit of Ralph Wilson, sworn to October 20, 1982). When this cost increase is passed on to plastic laminate producers, they will "be unable to compete in the manufacture and marketing of plastic laminates and related

4. Cyanamid cites MCI's vigorous anti-dumping campaign against foreign melamine producers. Foreign suppliers are said to be unwilling to risk the expense and exposure of anti-dumping proceedings in order to offer melamine crystals at competitive prices to domestic purchasers. There is little evidentiary basis to support this conclusion.

materials with Cyanamid, which by virtue of . . . [its ownership of Formica] will be able to price squeeze competitors out of that line of commerce." (Affidavit of Ralph Wilson, sworn to Oct. 20, 1982, p. 3).

We dispose of the arguments of Dart and PMC first because their invalidity seems clear and amenable to simple exposition.

First, contrary to the contentions of Dart and PMC, termination will not enable MCI to acquire or inherit a monopolistic position in the merchant melamine crystal market. If sound economic considerations should prompt Cyanamid to withdraw from the merchant melamine market, foreign producers should be expected to compete with MCI for the merchant melamine market demand previously satisfied by Cyanamid.[5]

Nor is it reasonable to assume that Cyanamid would withdraw from merchant sales. This assertion is both speculative and contrary to contemporary economic theory.

Corporate vertical integration is not, in and of itself, a violation of the antitrust laws. *Fruehauf Corp.* v. *F.T.C.*, 603 F.2d 345 (2d Cir. 1979). Under *Fruehauf*, vertical integration is not an antitrust violation unless it can be shown clearly that it will have a "probable anticompetitive impact" upon the relevant industry. *Fruehauf, supra*, at 353. The "mere possibility" that such a

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5. As we previously observed, melamine is fungible, and no good will or significant quality differential attaches to the manufacturer's brand. During 1982, approximately 33% of the merchant market demand for melamine crystals (excluding the demand of Formica division of Cyanamid) was satisfied by imported crystals. (Affidavit of Scotty B. Patrick, sworn to December 8, 1982, ¶ 5). Such statistics are not indicative of a permanent pattern because of world-wide price fluctuations in the sources of constituent raw materials such as natural gas and the effect of currency fluctuations in producing countries. Furthermore, it is a characteristic of the method of melamine production used by Cyanamid and MCI that lengthy plant failures may occur without warning. In 1981, MCI and Cyanamid experienced simultaneous plant shutdowns. On this occasion, foreign producers of melamine supplied the domestic market demand to the total exclusion of American producers, increasing total melamine imports from 13.7 million pounds in 1980 to 29.4 million pounds in 1981. (Affidavit of Robert P. Kreahling, sworn to October 27, 1982, Ex. 8). This response clearly manifests foreign producers' ability and desire to compete in the domestic melamine market when economically feasible to do so.

result might occur is an insufficient basis for an antitrust violation or justification for the perpetual existence of this Decree. *Fruehauf, supra*, at 351, citing *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 323 (1962); *BOC International Ltd.* v. *F.T.C.*, 557 F.2d 24, 28 (2d Cir. 1977); *Crown Zellerbach Corp.* v. *F.T.C.*, 296 F.2d 800, 824-25 (9th Cir. 1961), *cert. denied*, 370 U.S. 937 (1962); *United States* v. *Atlantic Richfield Co.*, 297 F.Supp. 1061, 1066 (S.D.N.Y. 1969), *aff'd sub nom. Bartlett* v. *United States*, 401 U.S. 986 (1971).

Contemporary economic theory recognizes that vertical integration may foster corporate efficiency and *enhance* competition in the market place. Yale Brozen, former consultant to the Justice Department's Antitrust Division, and currently Professor of Economics at the University of Chicago, states:

> "Vertical mergers produce no anticompetitive effects. Preventing them in the name of preventing 'foreclosure' simply prevents the use of the cheapest method of obtaining the efficiencies of vertical integration. Hostility to such mergers may cause waste of the existing capital stock, redundant capacity, and the misallocation of current capital supplies as preventing horizontal mergers did in the brewing industry. Also, where a firm buys from a non-competitive set of suppliers with excess capacity, earning little because of the excess in spite of a non-competitive price, acquisition of a supplier will be cheaper than building new facilities and will avoid wasting the economy's limited supply of capital. Such an acquisition, by decreasing cost to the buyer, may then force competition into the supplying industry by the buyer's competition with others in his industry and their defensive reactions. Vertical mergers, in this case are pro-competitive." Yale Brozen, Concentration, Mergers and Public Policy, at 402-03 (1982).

A rational division manager operating Cyanamid's melamine crystal production facility will continue to sell the merchant crystal market, at market prices, whenever the market price equals or exceeds the marginal unit cost. Since Cyanamid has a large and

recently erected facility, and since economies of scale in melamine production are very great, such unit cost should exist whenever it is feasible for Cyanamid to operate its plant at all. Furthermore a rational division manager operating Cyanamid's Formica division has no economic motivation to "buy" the crystals from a sister division if they can be acquired cheaper overseas or from MCI.[6] This Court and the antitrust laws may expect rational conduct economically motivated.

Furthermore, vacatur of the Decree does not exempt any part or non-party from its future obligations to refrain from anticompetitive conduct in restraint of trade or monopolistic activity. All pertinent statutes remain in force.

Dart and PMC also contend that termination of the Consent Decree will establish Formica as a dominant and monopolistic force in the plastic laminate industry by virtue of Cyanamid's vertical integration with Formica. MCI joins in this argument.

This Court does not believe that Cyanamid's vertical integration with Formica will diminish competition in the plastic laminate industry. Existing law prevents Formica from reducing the price of its consumer plastic laminate products below the cost of production. There is no basis to believe that Formica enjoys any significant economic advantage from vertical integration so long as the merchant melamine market price remains free from monopolization or price fixing and we believe that the economic self-interest of MCI and Cyanamid will assure this condition, as will the continued foreseeable presence of importer suppliers. Lower consumer prices for plastic laminate products should

6. Consistent with the economic concept of man as a "rationale maximizer of his self-interest," an individual will alter the operation of his business in response to economic changes in his surroundings if it is profitable to do so. Richard A. Posner, Economic Analysis of Law, at 3 (2d ed. 1977).

Industrial production is also governed by this course of conduct. "How things are produced is determined by the competition of different producers. The method [or raw material] that is the cheapest at any one time, because of both physical efficiency and cost efficiency, will displace a more costly method [or raw material]. The only way for producers to meet price competition and maximize profits is to keep costs at a minimum by adopting the most efficient methods [of production]." Paul A. Samuelson, Economics, at 44 (10th ed. 1976).

ensue. The federal antitrust laws are designed to protect competition, not competitors. *Buffalo Courier-Express, Inc.* v. *Buffalo Evening News, Inc.*, 601 F.2d 48, 58 (2d Cir. 1979); see also *Hanson* v. *Shell Oil Co.*, 541 F.2d 1352, 1358-59 (9th Cir. 1976), *cert. denied*, 429 U.S. 1074 (1977).

The interests of Dart, PMC and other users similarly situated do not require continuance of the Decree.

We turn now to the contentions of MCI. Implicit in this Court's public interest determination, is the careful consideration of whether termination of the Provision XI captive customer requirement will substantially lessen competition or tend to create a monopoly. Termination of an antitrust Consent Decree in any industry, which may create a monopoly or lessen competition, does not serve the public interest and will not be sanctioned by this Court.

In considering the propriety of a proposed termination, and the public's interest in such action, this Court recognizes that the Department of Justice, as part of the Executive Branch of Government has broad discretion in controlling and determining the public's interest in Government antitrust litigation; a policy interest different from that of this Court. See *Sam Fox Publishing Co.* v. *United States*, 366 U.S. 683, 689 (1961).

Absent abuse of discretion, the Government's conclusion that a decree should be vacated should be given great weight. The Court finds, and there is no credible evidence to the contrary, that the Justice Department has examined carefully the various contentions of these participants concerning termination, and has otherwise fulfilled its own obligation to represent the public's interest in this case. However, this Court does not serve as a rubber stamp for its conclusions.

All we have written above tends to show that the Consent Decree should be terminated; our primary concern is with the effect of the abrupt cessation of purchases by the Formica division from MCI.

At least in the long run, this Court is not persuaded by MCI's argument that termination of Provision XI will strike a death

blow to MCI, or re-establish Cyanamid as a monopolist in melamine crystals. Although it will take considerable time and effort, MCI can overcome and replace the loss in sales attributed to the Consent Decree's termination, by actively competing against Cyanamid and the foreign suppliers in the merchant melamine market.[7] Since foreign producers presently account for a significant share of the domestic melamine merchant market, their presence prevents Cyanamid or MCI from manipulating the domestic price of melamine, unilaterally or together.

We have noted that melamine production is a capital intensive business. MCI has invested substantial capital in a relatively new plant at Donaldsonville, La. Obviously it cannot recover its capital costs by withdrawing from the melamine market. I conclude that it is very unlikely MCI will cease melamine production as a result of termination of the Consent Degree. MCI now has every incentive to improve the operating efficiency of its melamine plant and of its sales effort, in order to compensate for lost revenues previously received from Cyanamid under the Consent Decree. Furthermore, as observed in relation to Cynamaid's future production and sales to the merchant market, MCI has the economic incentive to continue to produce melamine wherever it can sell the output of its plant at a price in excess of the cost of the marginal unit produced.[8]

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7. As we noted earlier, text at [A-37-38], it is foreseeable that Cyanamid's various divisions may continue to purchase melamine crystals from MCI if MCI's prices are competitive. Furthermore, in view of the recurrent spectre of unexpected shutdowns due to failure of its own melamine plant, Cyanamid's own economic interest may well be served by making regular contract purchases in reasonable amounts from MCI. Its failure or refusal to do so would tempt MCI to refuse to respond to emergency demands of Cyanamid except by quoting escalated "spot" prices.

8. This economic truth is distorted somewhat in MCI's favor: MCI's parent has a favorable allocation of natural gas, a basic raw material used in MCI's plant, which continues for several years, and might find it better to use this gas than to omit to take it. MCI's present melamine plant is located adjacent to and downstream in the production line from its major source of urea and ammonia, the Triad Urea and Ammonia Plant at Donaldsonville, La. The Triad plant is jointly owned and operated by Triad Chemicals Corp. and one of MCI's two corporate parents, First Mississippi Corporation. The Donaldsonville production

While this Court is not persuaded that the termination of Provision XI will cause MCI to go out of business, the Court finds that an abrupt termination thereof will have an adverse impact on MCI of a serious nature.

It is of course clear than an antitrust consent decree should only endure so long as, and contain only such remedial measures necessary to ensure competition. See *United States* v. *Bausch & Lomb Optical Co.*, 321 U.S. 707 (1944); *United States* v. *National Lead Co.*, 332 U.S. 319 (1947). An antitrust remedy is designed to restore competition not to punish a defendant. *United States* v. *E. I. du Pont Nemours & Co.*, 366 U.S. 316, 326 (1945).

Where, as here, the conditions which the decree was designed to remedy no longer exist, the decree should be terminated, especially where it operates against the competitive designs of antitrust legislation. See *King-Seeley Thermos Co.* v. *Aladdin Industries, Inc.*, 418 F.2d 31 (2d Cir. 1969); *United States* v. *Imperial Chemical Industry, Ltd.*, 1957 Trade Cas. ¶ 65,859 at ¶ 74,474 (S.D.N.Y. 1957). Accordingly, the Consent Decree should be terminated. Indeed a strong argument can be made that this should have been done long ago.

However, the present nature of the domestic melamine industry mitigates against an abrupt termination of the Consent Decree. Any Consent Decree is born of the Equity powers of this Court. In exercising its powers a Court of Equity must act fairly. A Serious question is presented, this Court finding as we do, that the Decree should be terminated, whether relief from Provision XI should not be done on a gradual basis over time, in order to do Equity, and enable MCI to make the production and marketing adjustments necessary to compensate for its sudden loss of Cyanamid's Formica division as a so-called captive customer.

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complex includes on-site facilities for rail and vessel transportation of melamine to major domestic and export markets. The design and location of this facility provides ample opportunity and incentive for MCI to improve the efficiency of its production process and marketing techniques, and to make more melamine rather than waste Triad's available constituent products.

The Consent Decree was intended, *inter alia*, to encourage others to enter the melamine industry. MCI takes the position that it is entitled to special consideration before a court of Equity because it relied upon the terms of the Consent Decree in entering the industry at a substantial investment of capital. There is substantial authority in the antitrust field to the effect that a decree may only be interpreted to promote competition and does not create vested rights for the benefit of particular competitors. See, *e.g.*, *United States* v. *Paramount Pictures Inc.*, 333 F.Supp. 1100, 1106 (S.D.N.Y.), *aff'd., sub nom. Syufy Enterprises* v. *United States*, 404 U.S. 802 (1971); *United States* v. *American Society of Composers, Authors and Publishers*, 341 F.2d 1003 (2nd Cir.), *cert. denied sub nom. Metromedia, Inc.* v. *American Society of Composers, Authors and Publishers*, 382 U.S. 877 (1965); *United States* v. *Loew's Incorporated*, 20 F.R.D. 423 (S.D.N.Y. 1957); *United States* v. *Bendix Home Appliances*, 10 F.R.D. 73 (S.D.N.Y. 1949).

Cyanamid argues with some justification that the only provisions in the Consent Decree which worked to the benefit of specific competitors were of fixed duration, and that it did not expect or agree to become "the guarantor of any specific company" or that it would be held to any such obligations 18 years later, when, because of the changes in the industry, and the effect of the Consent Decree, its monopoly power had ended. Cyanamid also argues that "to transform this Government case into a contest between MCI and Cyanamid as to which is most deserving of judicial solicitude is to deprive Cyanamid of rights it bargained for in settling the case." (Memorandum docketed December 21, 1982, p. 16). This argument may overstate the case somewhat, and tends more to show that the provisions of Provision XI may have been improvident when made.[9]

9. This comment is not disrespectful of the memory of our esteemed colleague, predecessor and friend Judge Levet. Like most district judges, then and now, Judge Levet viewed litigation as an adversarial process, favored the settlement of disputes on consent and would have had no qualms about approving a consent decree under the circumstances existing when this decree was presented. When entered, this Decree had the support of the Justice Department and was in accord with the economic and antitrust theories then fashionable.

The current economic recession and particularly the difficulties faced by domestic manufacturers of automobiles who are large users of melamine products, affect both MCI and Cyanamid. Products of Cyanamid's Formica division are used to a large extent in the construction industry. Here too, consumption is down due to current economic conditions.

At the time the Consent Decree was framed, other domestic producers were envisioned besides Cyanamid and MCI's predecessor, Fisher Chemical Company, so that true "reliance" in the traditional sense is probably not present here. That is to say, it cannot be shown that MCI's predecessor entered the market with the reasonable expectation of being the sole beneficiary of the captive customer provision in the Decree.

Recognizing the countervailing harm which the phased-out purchasing requirement might impose on Cyanamid, the Court would be willing to undertake so to provide, in order that the sudden disruption of the long standing relationships created by the Decree would not cause undue harm to MCI, its investors and employees. In the present fragile state of our economy, the nation can ill afford any abrupt industrial change which may increase unemployment or cause more manufacturing capacity to become idle. A Court of Equity should not be a party to creating such hardship, particularly where the only issue is whether the Court should act abruptly, or gradually over a sufficient period of time to permit a less painful adjustment.

Cyanamid, once it takes delivery of its remaining 1982 purchase requirements from MCI, will have an inventory position of approximately 20 million pounds of melamine crystal, almost twice its ordinary inventory at this time of year. The cost of carrying this inventory is said to approximate $40,000.00 per month, and the present inventory may be more than sufficient to cover the demands of its Formica division in the entire calendar year 1983, which is expected to be approximately six million pounds of melamine. (Affidavit of Robert P. Kreahling, sworn to December 20, 1982, ¶¶ 10, 20).

This Court, attempting to assist the parties in reaching a compromise, indicated a desire to consider whether in its modification of this Decree MCI could obtain the benefit of a "weaning period" during which Cyanamid's Formica division would gradually phase itself out as a purchaser, and MCI could adjust gradually to fully competitive conditions. Efforts of the parties, at the Court's urging, to reach agreement for a gradual phasing out of Provision XI were unsuccessful.[10]

Absent agreement, this Court had been prepared to impose a period of time for a gradual phasing out of the purchase requirement of Provision XI, and this Court is convinced that a Court of Equity functioning under ideal circumstances should do so.

On reflection, however, there appears to be a fundamental difficulty of impracticality, a prudent consideration of the sort which also regulates a Court of Equity in the exercise of its traditional powers. A Court of Equity will not exercise its equitable powers where it would "require such constant superintendence as to make judicial control a matter of extreme difficulty." *Standard Fashion Co.* v. *Siegel-Cooper Co.*, 157 N.Y. 60, 66 (1898); see also, *Beck* v. *Allison*, 56 N.Y. 366, 370 (1874). Nor will a Court of Equity grant equitable relief where it "appears to be impossible or impracitcable." *Doyle* v. *Allstate Ins. Co.*, 1 N.Y.2d 439, 443 (1956). In this situation, it is the difficulty in rendering judgment, not of enforcing it, that causes the Court to hesitate.

The Court could not simply pick a number between one year and ten years on an arbitrary basis during which to phase out the requirement. A rationale basis would have to be found to determine a reasonable period of time during which MCI could adjust to the sudden withdrawal of its captive customer, the Formica division of Cyanamid, without causing undue hardship in the form of unemployment or waste of assets. In making such a determination, a Court of Equity would also have to consider the equities favoring Cyanamid, which is now possessed of 20 million pounds of MCI melamine, presently and in the foreseeable future

10. Pursuant to Rule 408, F.R.Evid., this Court has not considered the respective offers of compromise proposed by the parties.

unuseable for economic reasons, and being stored at a substantial monthly expense.

Ordinarily it is an article of judicial faith that any disputed matter can be resolved simply by conducting an evidentiary hearing, but this Court perceives no way by which it could determine in this case, after or without an evidentiary hearing, that a precise term of months or years and no longer, would be fair and adequate to allow a gradual phasing in of competition for sales of melamine crystals to the Formica division of American Cyanamid, which never should have been allowed to stop in the first place, and yet not so long and onerous as to burden Cyanamid unfairly.

Solely for reasons of judicial impossibility, and in light of the inability of the parties to agree on a gradual phased in termination, the Court declines to make such a requirement a condition of its granting of the relief requested herein.

The present application is granted to the extent that defendant American Cyanamid Company is hereby released from all executory provisions of the Consent Decree dated August 4, 1964, except those which are merely declaratory of existing law, such release to become effective as of January 1, 1983.

All obligations attaching on or prior to December 31, 1982, including purchases of melamine for the Formica division during that year under Provision XI, shall remain in full force and effect and must be adhered to. This Court reserves jurisdiction over the parties and subject matter to enforce any provisions of the Decree relative to any period of time prior to January 1, 1983.

The foregoing constitutes this Court's findings of fact and conclusions of law pursuant to its hearing conducted on October 27, 1982, and all submissions received and docketed since that date.

Settle an order or judgment on five (5) days notice of settlement or waiver of notice. Each party shall bear its own costs.

Dated: New York, New York
January 10, 1993

CHARLES L. BRIEANT

Charles L. Brieant
U. S. D. J.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, *Plaintiff.* —*against*— AMERICAN CYANAMID COMPANY, *Defendant.*	60 Civ. 3857-CLB MEMORANDUM AND ORDER

BRIEANT, J.

Before the Court at this time are two applications for intervention pursuant to Rule 24, F.R.Civ.P. in which Melamine Chemicals Inc. ("MCI"), a producer of melamine, and Dart Industries Inc. ("Dart"), a manufacturer of plastic laminates which consumes melamine, seek to intervene in a motion by defendant American Cyanamid Company ("Cyanamid") to terminate the 1964 Consent Decree in this antitrust action.

On October 27, 1982, during oral argument on the motions, the Court by oral order, granted the motion of Plastics Manufacturing Co., Inc. ("PMI") to appear as an *amicus curiae* in this action.

Although a full description of this litigation's extended history is inappropriate for purposes of this application, a brief discussion is necessary.

The Justice Department filed this civil action on October 5, 1960 alleging that Cyanamid violated provisions of both the Sherman and Clayton Acts by monopolizing the markets for melamine and melamine-containing products. In 1964, the parties entered into the Consent Decree settling the case, which was approved by the late Hon. Richard H. Levet, a Judge of this Court. *United States* v. *American Cyanamid Co.*, 1964 Trade Cas. (CCH) ¶ 71,166 (S.D.N.Y. 1964).

On August 9, 1982, after a fifteen month investigation, the Justice Department and Cyanamid filed a proposed stipulation with this Court, seeking an order terminating the 1964 Consent Decree.

Pursuant to the disclosure procedures of 15 U.S.C. § 16, Cyanamid duly published notice of the proposed termination in two consecutive editions of the *Wall Street Journal*, the *Journal of Commerce* and the *Chemical Marketing Reporter*. Interested parties were then given sixty days to respond to the Department of Justice concerning the proposed termination. As a result, MCI, Dart and PMI submitted objections to the proposed termination. Each now seeks to participate in the litigation on the district court level.

The Consent Decree has been amended on three occasions since 1964. Arguably, since it was issued, many of its provisions have become obsolete. Some have expired. However, Provision XI, the portion of the Consent Decree in which movants are interested, has remained in effect unchanged.

Provision XI requires Cyanamid:

> ". . . to purchase annually from other producers of melamine (with preference to United States producers) an amount of melamine equivalent to . . . [Cyanamid's melamine requirements for the preceding year which it used] in the production of laminates in the United States provided that at any time after ten (10) years from such date, Cyanamid may petition to this Court to be relieved from this provision, such relief to be granted upon a showing by Cyanamid to the satisfaction of this Court that the effect of such relief will not be substantially to lessen competition or tend to create a monopoly in any line of commerce in any section of the country."

We need not consider at this time the interesting history of this provision, nor its motivation when presented to and adopted by the Court. We note however that Cyanamid had acquired Formica, Inc. ("Formica"), then and perhaps now the world's leading melamine laminate manufacturer, and a substantial purchaser of melamine.

In reliance on the Consent Decree's terms, MCI along with other venture capitalists, entered the melamine crystal production industry. With time, only MCI proved able to survive in the industry. To date it is the only domestic producer of melamine crystals other than Cyanamid. As a result, the practical effect of Provision XI is to provide MCI with substantial forced annual sales of melamine crystals to Cyanamid at prices limited only by the availability of foreign product.

In support of its application to intervene, MCI contends that the annual sales it receives pursuant to Provision XI are vital to its continued existence, and that termination of the Decree will end these sales and effectively force it out of business. This "will substantially lessen competition and . . . tend to create a monopoly [in Cyanamid]." (MCI's Memorandum in Opposition to Cyanamid's Motion to Terminate, p. 3).

MCI alleges that the Government has either "misconceived or ignored the true issues" in evaluating the propriety of the proposed termination of the Decree. (MCI's Memo in Opp., p. 14). Specifically, MCI contends that the Government has failed or refused to consider three relevant facts: (1) Cyanamid's ownership of Formica; (2) the effect of the proposed termination on the other customers and markets for melamine resins, laminates and other products that use melamine; and (3) Cyanamid's status as both a producer and consumer of melamine. (MCI's Memo in Opp., p. 15).

Proposed intervenor Dart, through its Ralph Wilson Plastics Division, produces plastic laminates in principal competition with Cyanamid's Formica division. Melamine resin, a basic raw material used in the production of plastic laminates, is produced from melamine crystals. As a result, producers of plastic laminates, such as Dart and PMI, are ultimately affected by any supply or demand change in the melamine crystal market.

Since Cyanamid and MCI are now the only domestic suppliers of melamine crystals, Dart contends that termination of the Consent Decree will have an anticompetitive impact on the plastic laminate industry because it will enable or encourage Cyanamid

to withdraw completely from the melamine crystal market, in order to use its melamine production capacity internally to meet the production demands of Formica. Whether or not this is a valid contention does not resolve the issue of intervention.

Dart and PMI assert that foreign melamine producers are not reliable sources for melamine crystals and have little competitive influence on the melamine or melamine related markets. They allege that as a result of MCI's vigorous anti-dumping campaign against foreign melamine producers, foreign suppliers are unwilling to risk the expense and exposure of anti-dumping proceedings in order to offer melamine crystals at competitive prices to domestic purchasers. (PMI's Memo in Opp., p. 7). Here again whether or not this is a valid contention does not resolve the issue of intervention.

As a result of Cyanamid's supposed intention to withdraw from the melamine crystal market and the absence of reliable and adequate foreign suppliers, Dart alleges that *MCI* will inherit a monopolistic position in the melamine crystal market. Melamine resin producers, on whom Dart and PMI rely, will be forced, it is said, "to pay monopolistic, anti-competitive prices for raw and intermediate materials." (Affidavit of Ralph Wilson, sworn to October 20, 1982). When this cost increase is passed on to plastic laminate producers, they will "be unable to compete in the manufacture and marketing of plastic laminates and related materials with Cyanamid, which by virtue of . . . [its ownership of Formica] will be able to price squeeze competitors out of that line of commerce." (Affidavit of Ralph Wilson, sworn to Oct. 20, 1982, p. 3). Here again whether or not this is a valid contention does not resolve the issue of intervention.

In opposition to applicants' motions to intervene, the Justice Department asserts that it has fully examined and evaluated the applicants' contentions and has nonetheless concluded that termination of the Consent Decree is appropriate because it is no longer necessary to insure a competitive melamine market.

In support of this conclusion, Justice Department cites the fundamental changes in the melamine industry and the emergence of foreign producers as realistic, competitive sources of melamine crystals.

The immediate question presented here is solely whether MCI and Dart should be permitted to intervene in this action pursuant to Rule 24, F.R.Civ.P. as of right, as they assert, or permissively, in the Court's discretion.

The Court notes at the outset that counsel for the parties have conceded on the record that Cyanamid's motion to terminate may be resolved by the Court essentially on the present record before it, without the introduction of significant additional evidence and without further hearings. Therefore, it seems implicit that intervention is sought here primarily to preserve the applicants' right to appeal this Court's ultimate determination of Cyanamid's motion to terminate the Consent Decree, and possibly also to present any additional information should the Court request same after further study.

In order for MCI or Dart to intervene as of right, they must satisfy Rule 24(a)(2), F.R.Civ.P., which states in relevant part that:

> "(a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: . . . (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by the existing parties."

In Government antitrust consent decree hearings, it has been held consistently, with the rarest exception, that a private party will not be permitted to intervene as of right absent a showing that the Government has failed "fairly, vigorously and faithfully" to represent the public interest. *United States* v. *Ciba Corp.*, 50 F.R.D. 507 (S.D.N.Y. 1970); see also *United States* v. *Stroh Brewery Co.*, 1982-2 Trade Cas. (CCH) ¶64,782 (D.D.C.

1982); *United States* v. *Carrols Development Corp.*, 454 F.Supp. 1215 (N.D.N.Y. 1978); *United States* v. *Hartford-Empire Co.*, 573 F.2d 1 (6th Cir. 1978); *United States* v. *Mid-American Dairyman, Inc.*, 1977-1 Trade Cas. (CCH) ¶ 61,508 (W.D. Mo. 1977); *United States* v. *Associated Milk Producers, Inc.*, 534 F.2d 113 (8th Cir.), *cert. denied sub nom. National Farmers' Organization, Inc.* v. *United States*, 429 U.S. 940 (1976); *United States* v. *Paramount Pictures, Inc.*, 333 F.Supp. 1100 (S.D.N.Y. 1971), *aff'd.*, 404 U.S. 802 (1971); *United States* v. *Western Electric Co.*, 1968 Trade Cas. ¶ 72,415 (D. N.J. 1968), *aff'd. sub nom. Clark Walter and Sons, Inc.* v. *United States*, 392 U.S. 659 (1968).

The leading exception to the numerous cases denying intervention as of right in matters such as this is *Cascade Natural Gas Corp.* v. *El Paso Natural Gas Co.*, 386 U.S. 129 (1967). In *Cascade*, the Court permitted parties to intervene as of right where it found that the Government, in entering an antitrust consent decree, had compromised the interest of the public and of the proposed intervenors allegedly in direct contradiction of the Supreme Court's prior mandate to the contrary. Subsequent decisions have limited the scope of *Cascade* to its rather unusual presumed facts, which are not present in this litigation. *United States* v. *Ciba, supra; United States* v. *Paramount Pictures, Inc., supra; United States* v. *American Telephone and Telegraph Co.*, 552 F. Supp. 131 at 218, n. 362 (D.D.C. 1982).

In light of the present record before the Court, there is no basis whatever to find that the Government has failed in any respect to pursue and represent the public interest in this litigation in good faith. Accordingly, intervention as of right is inappropriate.

Pursuant to Rule 24(b)(2), F.R.Civ.P.:

> "Upon timely application anyone may be permitted to intervene in an action: . . . (2) when an applicant's claim or defense and the main action have a question of law or fact in common . . . In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties."

The ultimate issues now posed in this case are (1) whether termination of the Consent Decree will lesson competition, or (2) tend to create a monopoly, or (3) enhance or detract from the current competitive balance of the melamine crystal and melamine related markets.

In determining that question, the Court must consider MCI and Dart's respective claims that termination will have an undue or unlawful anti-competitive impact on the respective melamine markets of concern to them. Without question, such claims are directly related to the subject matter of this litigation.

As a practical matter, permissive intervention, if granted here, will not unduly delay or prejudice the original parties to this litigation. The time consuming and expensive discovery demands often asserted by intervening parties will not be endured here. Applicants seek only to preserve their right to appeal an adverse decision in this action, and to participate in such further proceedings as this Court may direct on its own motion. Any attendant delay attributed to such an appeal of this Court's ultimate determination would not be unduly prejudicial and at least in theory would be in accord with fundamental concepts of Justice.

As held in *United States* v. *American Telephone and Telegraph Co., supra*, the court has considerable latitude in assuring that the public interest is served in antitrust consent decree hearings:

> "The procedures required for the protection of the public interest necessarily depend upon many different circumstances—which is precisely why the Congress left to the courts' discretion the means by which their public interest responsibilities would be effected." [552 F.Supp. at 216]

In the *Telephone* case, *supra*, the court permitted numerous parties to intervene in order to preserve, among other things, the applicants' right to appeal the entry of the proposed consent decree.

Although the circumstances of this case do not approach the complexity of the *Telephone* litigation, the case before this Court is an unusual one. Although MCI was not granted specific rights

in the Consent Decree, it may be said to have relied upon and profited from its perpetual provisions. Surely a Court of Equity cannot ignore this history, although we do not suggest MCI thereby gained any vested rights in its continuance. The anti-trust laws protect competition, not competitors. See *Buffalo Courier-Express, Inc.* v. *Buffalo Evening News*, 441 F.Supp. 628, 646 (W.D.N.Y. 1977), *rev'd. on other grounds*, 601 F.2d 48 (2d Cir. 1979) and cases cited thereunder. Dart's position is essentially similar, although perhaps adverse to MCI in the market.

In light of the unusual factual setting, and the close relationship between the applicants' claims and the main issue now before the Court, I conclude that the applicants should each be granted permissive intervention as parties in this action.

Applicants' motions to intervene are granted in the Court's discretion pursuant to Rule 24(b)(2), F.R.Civ.P., conditioned upon their continued adherence, respectively, to all procedural stipulations and agreements offered at the hearing. See Transcript of October 27, 1982.

So Ordered.

Dated: New York, New York
November 9, 1982

CHARLES L. BRIEANT

Charles L. Brieant
U. S. D. J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, *Plaintiff.* —*against*— AMERICAN CYANAMID COMPANY, *Defendant.*	Civil Action No. 60 Civ. 3857 (CLB)

MEMORANDUM OF THE UNITED STATES IN RESPONSE TO MOTION OF AMERICAN CYANAMID COMPANY TO TERMINATE THE FINAL JUDGMENT HEREIN

American Cyanamid Company ("Cyanamid"), the defendant herein, has moved this Court to terminate the Final Judgment in this action, which was entered on August 4, 1964. In a Stipulation between Cyanamid and the United States, Cyanamid has agreed to publish notice of the motion, and an invitation for comments thereon, in *The Wall Street Journal, The Journal of Commerce* and *The Chemical Marketing Reporter;* and the United States has tentatively consented to the entry of an order terminating the Final Judgment at any time more than seventy (70) days after the last publication of such notice, provided that Cyanamid dedicates to the public all patents subject to the mandatory licensing provision of the Final Judgment. Cyanamid has agreed to this condition.

In this memorandum we summarize the Complaint and Final Judgment, explain the reasons why the United States has consented to termination of the Judgment, and discuss the legal standards and precedents regarding judgment termination. We also discuss the procedures proposed by the Government, and agreed to by Cyanamid, for giving public notice of the pending motion, obtaining public comment thereon, and assuring the right

of the Government to withdraw its consent during and after the comment period.

I. The Complaint and the Final Judgment

The Complaint in this action was filed on October 5, 1960. It charged that, beginning in 1937, Cyanamid had violated Sections 1 and 2 of the Sherman Act (15 U.S.C. §§ 1 & 2) by monopolizing melamine and melamine-containing products through an illegal agreement made with six foreign and domestic companies in order to exploit the competitive advantage which Cyanamid had in the manufacture and sale of these products. This advantage came primarily from Cyanamid's exclusive domestic control of dicyandiamide ("dicy"), the raw material from which melamine was then primarily made. Cyanamid had manipulated the availability and pricing of dicy to discourage melamine manufacture by others, and had also caused foreign producers to refuse to sell melamine to anyone in the United States not approved by Cyanamid. The Complaint also charged that Cyanamid had violated Section 7 of the Clayton Act (15 U.S.C. § 18) by its acquisition of the Formica Company, a leading consumer of melamine laminating resins.

In July 1964 a proposed consent judgment was filed in this Court, and it was subsequently entered on August 4, 1964. The Judgment called for Cyanamid to divest itself within two years of the larger of its two melamine manufacturing facilities, and to take a number of other steps designed to break up Cyanamid's monopoly of melamine in the United States. These steps included time-limited obligations, such as sharing its know-how and technology in melamine-related fields for up to twenty-two years; foregoing acquisitions in melamine-related products for ten years and obtaining Government or Court approval for such acquisitions for another ten years; and limiting for ten years the amount of melamine it produced unless overall production increased to a stated amount. In addition, the Judgment enjoined Cyanamid in perpetuity from engaging in certain anticompetitive acts, most of which would involve violations of

the antitrust laws even absent the decree, and also from entering into or continuing agency and other relationships with co-conspirator companies or firms in the melamine business. Finally, Cyanamid was required to purchase annually, preferably from domestic producers, an amount of melamine equal to its domestic use for laminates.

Some of the decree's provisions have expired. Divestiture of a melamine-from-dicy plant was accomplished in 1964. The 10-year ban on acquisitions in melamine fields has expired, as has the production limitation. In addition, many of the patents subject to the compulsory licensing requirement have expired. The following provisions of the Judgment are still in effect:

(1) Section VI, which enjoins Cyanamid from (a) entering into or maintaining any agreement to allocate or divide customers, territories or markets in melamine or melamine-containing products; (b) limiting or restraining competition in these products; (c) restraining the importation into or exportation from the United States of any such products; or (d) refusing to do business in these products with anyone;

(2) Section VII, which enjoins Cyanamid from (a) referring any orders or requests for information for dicy, melamine or melamine-containing products to any co-conspirator or any company in a melamine business; (b) entering into distributor or agency relationships with such companies with respect to dicy, melamine or melamine-containing products; (c) coercing anyone not to engage in the manufacture or sale of dicy, melamine, or melamine-containing products; and (d) restraining the uses to which these products might be put after sale;

(3) Section VIII, which enjoins Cyanamid from refusing to sell dicy or any melamine resin to anyone able to pay for it, and from fixing the differential between the prices charged by it for dicy and for melamine or melamine resins so as to restrain trade;

(4) Section IX, which requires Cyanamid to grant a license, subject to reasonable royalty fees, for patents acquired by Cyanamid for up to five years following entry of the decree (1969) covering melamine made from dicy and melamine resins;

(5) Section XI, which requires Cyanamid to purchase annually from other producers of melamine (with a preference to United States producers) an amount of melamine equivalent to Cyanamid's requirements for its production of laminates in the United States in the preceding year; and

(6) Section XIII, which requires Cyanamid, until 1984, to obtain the approval of the Government or the Court for any acquisition in North America of a melamine-related business.

Since entry of the decree, this Court has on three occasions entered orders affecting Cyanamid's obligations under it. Cyanamid was twice (in 1973 and 1974) allowed to produce a quantity of melamine greater than that then permitted under (now-expired) Section V of the Judgment, and in 1969 Cyanamid was allowed to begin construction of a melamine-from-urea plant in Louisiana, which effectively increased its capacity to produce melamine. In addition, in 1975 this Court ruled that Cyanamid was not guilty of criminal contempt when it produced more than 30 million pounds of melamine in 1972. *United States* v. *American Cyanamid Co.*, 1978-1 Trade Cas. ¶61,843 (S.D.N.Y. 1977).

II. The Reasons Why the Government Has Consented To Termination of This Final Judgment

The principal goal of the Final Judgment was to break up a monopoly which was alleged to have resulted in artificially high prices for such diverse items as laminated plastics, unbreakable dinnerware, and water and flameproof products. Cyanamid's control of the basic raw material for melamine—dicy—and its agreements with the co-conspirator firms provided the primary bases for the Sherman Act violations alleged.

Today, the circumstances under which the markets for melamine and melamine-containing products operate are completely different from those which obtained in the pre-complaint period. Cyanamid no longer controls the basic raw material from which melamine is made and it no longer has the power to dictate to whom and how foreign suppliers of melamine itself will sell. Even more significantly, it is no longer the sole domestic seller of melamine for the merchant market.

Melamine presently is produced in the United States by Cyanamid and by Melamine Chemicals, Inc. ("MCI"). Both produce melamine at plants in Louisiana using melamine-from-urea technology developed by a Dutch company. In such case, the urea is produced at an adjacent facility which uses natural gas as its basic ingredient. Both domestic producers presently operate under long-term contracts with different suppliers for their melamine feedstocks. Capacity for each company's plant is about 70 million pounds annually.

The major portion of Cyanamid's melamine production is consumed by it internally; the remainder is sold on the merchant market. In 1980, according to defendant's representations, Cyanamid's sales to this market were about 17.6 million pounds; in 1981 such sales amounted to some 8.8 million pounds. Cyanamid estimates, based on industry information, that its sales to the merchant market in 1981 amounted to 15.3%, while MCI's sales to this market amounted to some 34%.

An increasingly significant factor in the domestic market for melamine has been the role of imports, which supplied some 50% of the market in 1981. Since an adverse ruling in the International Trade Commission in 1976, Japan's melamine sales in this country have been small, but significant quantities of Dutch, Italian, Austrian, Brazilian and Kuwaiti melamine have been sold here since then at prices below those of the American producers. It is thus eminently clear that competitive factors exist at this time, in sharp contrast to the pre-Judgment situation.

Given the present state of competition in the melamine market, the reasons which once existed for the requirement that Cyanamid purchase a portion of its melamine requirements from a domestic producer have ceased to be compelling. To the extent that a purchase requirement adds to Cyanamid's costs of doing business, such costs work against price reductions in melamine-containing products made by Cyanamid, and the requirement now disserves the public. To the extent that such a provision results merely in a transfer of profits from one competitor to another, it also fails to benefit the public. Neither does a public benefit accrue from the remaining sections of the Judgment. Cyanamid has agreed to dedicate to the public the patents still covered by the Judgment. These patents cover several melamine-related processes and products, and their availability in the public domain will guarantee their fullest potential use.

Termination of the other remaining provisions of the Judgment should result in no loss to the public interest. Section VI, for example, proscribes conduct which, if engaged in after termination of the Judgment, would violate the antitrust laws. The prospect of a Sherman Act prosecution should be as effective a deterrent to such conduct as the continued existence of Section VI.

The same point may be made with respect to Section VII, to the extent that that provision enjoins coercive or exclusionary conduct. However, Section VII also prohibits certain business relationships, including distributorship or agency arrangements, with others engaged in the melamine business. Under present circumstances many such arrangements may be otherwise lawful and procompetitive. Since the antitrust laws will be fully applicable to any such relationship which has an anticompetitive purpose or effect, the absolute prohibitions of Section VII no longer serve the public interest in vigorous and unfettered competition.

Section VIII relates specifically to the melamine-from-dicy technology. Since that technology is now obsolete, the section no longer has any practical effect.

With respect to Cyanamid's obligation under Section XIII until 1984 to obtain the approval of the Government or the Court before acquiring any melamine-related business in North America, we are satisfied that adequate notice of any acquisition which may be anticompetitive will be given to the Government even without the Judgment. Acquisitions of significant size would necessarily be reported under the Hart-Scott-Rodino Act and would, of course, be reviewed under the appropriate standards. Even smaller acquisitions are likely to be reviewed through the Antitrust Division's normal investigatory channels. Melamine-related acquisitions by Cyanamid have been prohibited or regulated by the decree for 18 years. It appears unlikely that the public will be disserved in any way by the termination of this time-limited provision within two years of its expiration.

In view of the foregoing, efficient allocation of prosecutorial and judicial resources dictates that the decree be disposed of in its entirety at this time. Some of its terms are unduly restrictive in today's markets by reason of changed competitive circumstances, and others are merely superfluous. Termination of this decree would serve the public interest in promoting competitive and efficient markets.

III. The Legal Standards Applicable to the Termination Of An Antitrust Decree with the Consent of the Government

This Court has jurisdiction to modify or terminate the Final Judgment pursuant to Section XV of the Judgment, Rules 60(b)(5) and (6) of the Federal Rules of Civil Procedure, and "principles inherent in the jurisdiction of the chancery." *United States* v. *Swift & Co.*, 286 U.S. 106, 114 (1932).

Where, as here, the United States consents to the proposed termination of the final judgment in a government antitrust case, the issue before the Court is whether termination of the judgment is "in the public interest." *United States* v. *Swift & Co.*, 1975-1 Trade Cas. ¶60,201 at 65,702 (N.D. Ill. 1975); *see also United States* v. *General Electric Co.*, 1977-2 Trade Cas. ¶61,659 at

72,717 (E.D. Pa. 1977). This is the same standard that a district court applies in deciding whether to enter an initial consent decree submitted by the Government in an antitrust proceeding. *See* 15 U.S.C. §16(e) (1976); *United States* v. *Radio Corp. of America*, 46 F. Supp. 654, 656 (D. Del. 1942), *appeal dismissed*, 318 U.S. 796 (1943) ("modification or vacation of a consent decree . . . involves the same duty of the court independently to determine that the acton is equitable and in the public interest" as does the entry of a consent decree initially).

The Supreme Court has held that where the words "public interest" appear in federal statutes designed to regulate public sector behavior, they "take meaning from the purposes of the regulatory legislation." *NAACP* v. *FPC*, 425 U.S. 662, 669 (1976). In this case, the Sherman Act is the underlying statute, and "the policy unequivocally laid down by [that] Act is competition." *Northern Pacific Railway* v. *United States*, 356 U.S. 1, 4 (1958); *accord, e.g., National Society of Professional Engineers* v. *United States*, 435 U.S. 679, 695 (1978).

Thus, the ultimate question before the Court at this time is whether termination of the Final Judgment, by removing some lingering restraints upon Cyanamid's ability to compete with respect to the sale of melamine and melamine-containing products, would serve the public interest in "free and unfettered competition as the rule of trade." *Northern Pacific Railway* v. *United States, supra*, 356 U.S. at 4.

In answering this question, the Court should recognize that the Department of Justice has broad discretion in controlling government antitrust litigation. *See Sam Fox Publishing Co.* v. *United States*, 366 U.S. 683, 689 (1961); *cf. Control Data Corp.* v. *International Business Machines Corp.*, 306 F. Supp. 839, 845 (D. Minn. 1969), *aff'd sub nom. Data Processing Financial & General Corp.* v. *International Business Machines Corp.*, 430 F.2d 1277 (8th Cir. 1970) ("The Attorney General is the representative of the public interest in antitrust cases brought by the [G]overnment").

In *United States* v. *Mid-America Dairymen, Inc.*, 1977-1 Trade Cas. ¶ 61,508 at 71,980 (W.D. Mo. 1977), the court accurately summarized the judiciary's role in determining whether the initial entry of a consent decree is "in the public interest":

> Absent a showing of corrupt failure of the government to discharge its duty, the Court, in making its public interest finding, should . . . carefully consider the explanations of the government . . . and its responses to comments in order to determine whether those explanations are reasonable under the circumstances. . . .
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> This Court may not substitute its opinion or views concerning the prosecution of alleged violations of the antitrust laws or the determination of appropriate injunctive relief for the settlement of such cases absent proof of an abuse of discretion.

The same role is appropriate when the Government consents to the termination of a decree. Where the Department of Justice has offered a reasoned and reasonable explanation of why the termination of a judgment vindicates the public interest in free and unfettered competition, and there is no "showing of corrupt failure of the government to discharge its duty," the Court should defer to the Department's conclusions concerning the appropriateness of the termination.[1]

IV. The Proposed Procedures for Giving Public Notice of the Pending Motion and Inviting Comment Thereon

United States v. *Swift & Co.*, *supra*, 1975-1 Trade Cas. at 65,703, discusses a court's responsibility to implement procedures

1. Over the years, courts have approved literally hundreds of consent orders modifying or terminating government antitrust decrees. Recent instances include:

> *United States* v. *Grinnell Corp.*, Civ. No. 2785/1967 (D.R.I. May 5 and January 20, 1982); *United States* v. *Great Lakes Towing Co.*, Civ. No. 8003 [Equity No. 72] (N.D. Ohio December 2, 1981); *United States* v. *Witco Chem. Corp.*, 1982-1 Trade Cas. ¶64,591 (W.D. Pa. 1981); *United States* v. *Lee Shubert*,

that will give nonparties notice of, and an opportunity to comment upon, antitrust judgment modifications proposed by consent of the parties:

> Cognizant . . . of the public interest in competitive economic activity, established chancery powers and duties, and the occasional fallibility of the Government, the court is, at the very least, obligated to insure that the public, and all interested parties, have received adequate notice of the proposed modification. . . . (Footnote omitted.)

The Department of Justice believes that giving the public notice of the filing of a motion to terminate the final judgment in a government antitrust case, and an opportunity to comment upon that motion, is necessary to insure that both the Department and the Court properly assess the "public interest." Accordingly, over the years, the Department has adopted and refined procedures to apply when a tentative decision has been made to support

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1982-1 Trade Cas. ¶64,572 (S.D.N.Y.); *United States* v. *New York Coffee & Sugar Exch., Inc.*, 1982-1 Trade Cas. ¶64,540 (S.D.N.Y. 1981); *United States* v. *Hart Schaffner & Marx*, Civ. No. 68-C-2167 (N.D. Ill. Sept. 30, 1981); *United States* v. *Scott Aviation Div.*, A-T-O Inc., Civ. No. 8432-E (W.D.N.Y. July 23, 1981); *United States* v. *International Boxing Club, Inc.*, Civ. No. 74-81 (S.D.N.Y. June 30, 1981); *United States* v. *American Thread Co.*, Eq. No. 312 (D.N.J. June 19, 1981); *United States* v. *Coca-Cola Bottling Co.*, 1980-81 Trade Cas. ¶63,664 (C.D. Cal. 1980); *United States* v. *SKF Indus., Inc.*, Civ. No. 9862 (N.D. Ohio November 3, 1980); *United States* v. *Quaker State Oil Ref. Corp.*, 1980-81 Trade Cas. ¶63,627 (W.D. Pa. 1980); *United States* v. *Leviton Mfg. Co., Inc.*, 1980-2 Trade Cas. ¶63,543 (D. Conn. 1980); *United States* v. *Georgia Automatic Merchandising Council, Inc.*, 1980-2 Trade Cas. ¶63,448 (N.D. Ga. 1980); *United States* v. *Aerofin Corp.*, 1979-1 Trade Cas. ¶62,598 (S.D.N.Y. 1979); *United States* v. *Imperial Chemical Indus., Ltd.*, Civ. No. 24-13 (S.D.N.Y., December 12, 1979); *United States* v. *First Nat'l City Bank*, 1978-1 Trade Cas. ¶62,223 (S.D.N.Y. 1978); *United States* v. *Hartford-Empire Co.*, 1978-1 Trade Cas. ¶62,057 (N.D. Ohio 1976); and *United States* v. *General Electric Co.*, 1977-2 Trade Cas. ¶61,659 (E.D. Pa. 1977).

We are not aware of any instance in which a consent modification or termination has been rejected by a court.

modification or termination of a judgment in an antitrust case. The essential elements of this procedure are as follows:

1. When the motion is filed, the Department issues a press release which (a) summarizes the complaint, the judgment, and the Government's reasons for consenting to the motion; (b) explains where copies of all the relevant papers can be inspected (in most cases, at the offices of the Antitrust Division and the Clerk of the Court where the motion was filed); (c) states that copies of the papers can be obtained from the Antitrust Division, upon request and payment of the copying fees prescribed by Justice Department regulations; and (d) invites all interested persons to send comments concerning the proposed modification or termination to the Antitrust Division during the next sixty days.

2. The defendant publishes notice of its motion in two consecutive issues of the national edition of *The Wall Street Journal* and in two consecutive issues of the trade journal(s) most likely to be read by persons interested in the market(s) affected by the judgment. The published notices invite public comment and contain essentially the same information about the proceeding as appears in the Department's press release, omitting only the description of the Department's reasons for consenting to the motion.

3. The Department of Justice files with the court copies of all comments that it receives.

4. The parties stipulate that the court will not rule upon the motion for at least seventy days after the last publication of the notices described above (and thus for at least ten days after the close of the period for public comments), and the Government reserves the right to withdraw its consent to the motion at any time until an order modifying or terminating the judgment is entered.[2]

2. Withdrawal by the Department of Justice of its consent would be significant because the legal standard applicable to a motion to modify or terminate an antitrust judgment over the Government's objection is far stricter than the standard applicable to a modification or termination with our consent. Where the Government opposes a motion to modify

We believe that this procedure is well designed to provide all potentially interested persons with notice that a motion to terminate a judgment is pending, and an adequate opportunity to comment thereon.[3] The defendants here have agreed to follow this procedure, including publication of appropriate notices in *The Wall Street Journal*, *The Journal of Commerce*, and *The Chemical Marketing Reporter*.[4] The parties are therefore submitting to the Court a separate proposed order establishing this procedural approach, and we ask that it be entered forthwith.

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or terminate an antitrust decree, the moving party must demonstrate that changes since entry of the judgment "are so important that dangers, once substantial, have become attenuated to a shadow. . . . Nothing less than a clear showing of grievous wrong evoked by new and unforeseen conditions should lead [a court] to change what was decreed. . . ." *United States* v. *Swift & Co.*, 286 U.S. 106, 119 (1932).

3. In a recent case involving a consent modification of an antitrust judgment, a district court directed the parties to follow the procedures set forth in the Antitrust Procedures and Penalties Act (the "APPA"), 15 U.S.C. §16(b)-(h)(1976). *United States* v. *Motor Vehicle Mfrs. Ass'n*, 1981-2 Trade Cas. ¶ 64,370 (D.C. Cal. 1981). The Court's order does not, however, purport to hold that the APPA is applicable to all consent modifications as a matter of law. Further, we believe that the decision was incorrect because the APPA operates only when an initial consent decree is presented to a court for approval. We note, nonetheless, that the procedures proposed here generally follow those of the APPA, with certain differences that make the procedures we propose more likely to bring the defendant's motion to the attention of interested nonparties. For example, the APPA would require that notices be published in the Federal Register and in newspapers in the District of Columbia and in this district. The procedure we propose, on the other hand, would require publication in *The Wall Street Journal*, *The Journal of Commerce* and *The Chemical Marketing Reporter*, where notices are more likely to be seen by the persons who will be most interested in the defendant's motion. Accordingly, we submit that not only is the APPA inapplicable here, but its procedures would provide decidedly inferior notice under the circumstances. *Cf. United States* v. *General Electric Co., supra*, 1977-2 Trade Cas. at 72,716 n.1.

4. The Department of Justice intends to send copies of Cyanamid's motion papers and this memorandum to Melamine Chemicals, Inc., the only domestic melamine producer other than Cyanamid and therefore the firm that would be most directly affected by termination of the purchase requirement of Section XI of the Final Judgment.

5. **Conclusion**

For the foregoing reasons, the United States (1) asks the Court to enter the order submitted herewith directing publication of notice of Cyanamid's motion, and (2) tentatively consents to the termination of the Final Judgment herein, provided that Cyanamid dedicates to the public all patents subject to the mandatory licensing provision of the Final Judgment.

August 5, 1982

Respectfully submitted,

GREGORY B. HOVENDON

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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, *Plaintiff.* —*against*— AMERICAN CYANAMID COMPANY, *Defendant.*	Civil Action No. 60 Civil 3857 Entered: August 4, 1964

FINAL JUDGMENT

Plaintiff, United States of America, having filed its complaint herein on October 5, 1960, and an amendment thereto on October 13, 1960, and defendant, American Cyanamid Company, having appeared and filed its answer to such complaint, as amended, denying the substantive allegations thereof; and plaintiff and defendant, by their respective attorneys, having severally consented to the making and entry of this Final Judgment without trial or adjudication of any issue of fact or law herein, and without this Final Judgment constituting evidence or an admission by either party hereto with respect to any such issue, and the Court having considered the matter and being duly advised,

NOW, THEREFORE, before any testimony has been taken and without trial or adjudication of any issue of fact or law herein and upon consent of the parties hereto, it is hereby

ORDERED, ADJUDGED and DECREED as follow:

I

This Court has jurisdiction of the subject matter hereof and of the parties hereto. The complaint stated claims for relief against the defendant under Sections 1 and 2 of the Act of Congress of July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies," commonly known as the Sherman Act, as amended, and under Section 7 of

the Act of Congress of October 15, 1914, entitled "an act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," commonly known as the Clayton Act, as amended.

II

As used in this Final Judgment:

(A) "Cyanamid" shall mean the defendant, American Cyanamid Company, a corporation organized and existing under the laws of the State of Maine;

(B) "Subsidiary" shall mean in respect to any corporation, including Cyanamid, a second corporation, a majority of whose outstanding voting stock is owned or directly or indirectly controlled by such first corporation;

(C) "Person" shall mean any individual, partnership, firm, corporation, association or other legal or business entity;

(D) "Co-conspirators" shall mean the following corporations, their successors and assigns, and each of them:

(1) Monsanto Chemical Company, a corporation organized and existing under the laws of Delaware;

(2) Ciba Limited, a corporation organized and existing under the laws of Switzerland;

(3) Ciba Products Corp., a corporation organized and existing under the laws of Delaware;

(4) British Industrial Plastics Ltd., a corporation organized and existing under the British Companies Act;

(5) Societe des Produits Azotes, a corporation organized and existing under the laws of France; and

(6) The British Oxygen Company Limited, a corporation organized and existing under the British Companies Act;

(E) "Acquirer" shall mean any person, who is a purchaser or lesser pursuant to Section IV of this Final Judgment, approved by plaintiff, or the Court after notice to the plaintiff and opportunity to be heard;

(F) "United States" shall mean the United States, its territories and possessions;

(G) "North America" shall mean that portion of the Western Hemisphere north of the country called Guatemala including the islands adjacent thereto, the Greater and Lesser Antilles and the United States;

(H) "Dicy" shall mean diayandiamide, the basic raw material from which melamine heretofore has been and is commercially produced, the basic ingredients of which are limestone, carbon and nitrogen which are chemically changed through the application of heat, electricity, pressure and the additjon of other substances;

(I) "Melamine" shall mean the compound, $C_3H_6N_6$, produced commercially from dicy, calcium cyanamid, urea or any other substance;

(J) "Melamine resin" shall mean a reaction product of (1) melamine and an aldehyde or (2) melamine, an aldehyde and one or more other chemical components;

(K) "Laminates" shall mean articles formed by the combined action of heat and pressure on composite assemblies composed of super-imposed layers of material, with the use of a melamine resin, where an exterior surface takes a substantial degree of the characteristics of the melamine resin used for the formation of such composite assemblies;

(L) "Molding compound" shall mean a composition, containing melamine resin and a filler, which is customarily formed, shipped, and set under the combined action of heat and pressure;

(M) "Patents" shall mean any United States Letters Patent and Applications therefor, all reissues, divisions, continuations or extensions thereof, and patents issued upon said applications:

> (1) "Present Patents" shall mean such patents as are owned or controlled by Cyanamid or under which Cyanamid has the right to grant licenses, on the date of entry of this Final Judgment;
>
> (2) "Future Patents" shall mean such Patents (other than those Present Patents as defined in subparagraph (1) of this subsection (M)) which are issued to, filed,

acquired or controlled by Cyanamid or under which Cyanamid may acquire the right to grant sublicenses, at any time within five (5) years from the date of entry of this Final Judgment;

(N) "Willow Island" shall mean that portion of the chemical complex owned and operated by Cyanamid at Willow Island, West Virginia, which is housed in building No. 95, in which portion Cyanamid produces melamine together with the adjacent melamine storage silo and those storage tanks forming an integral part of the melamine manufacturing process and the real estate adjacent thereto. The major items of equipment are set forth in Appendix A hereto and the real estate in Appendix B hereto.

III

The provisions of this Final Judgment applicable to Cyanamid shall apply also to its officers, agents, servants, employees, subsidiaries, successors and assigns, and to those persons in active concert or participation with it who receive actual notice of this Final Judgment by personal service or otherwise, but shall not apply to transactions solely between Cyanamid and its said officers, agents, servants, employees and subsidiaries, or solely between any of them.

IV

(A) Cyanamid is ordered and directed forthwith to initiate action to place it in a position to comply with the following terms of this Section IV.

(B) Cyanamid shall within two (2) years following the date of entry of this Final Judgment dispose of Willow Island. Such disposition shall be consistent with any one of the following:

(1) The sale of Willow Island. Such sale of Willow Island may be conditioned upon Cyanamid's having the right of first refusal should the owner desire to sell Willow Island for use other than the manufacture of melamine, subject however, to sub-section (B) of Section V of this Final Judgment;

(2) The sale of the personal property, including machinery, tools and equipment of Willow Island and used or usable in the manufacture of melamine from dicy. Such sale shall be for the purpose of aiding or enabling the purchaser to manufacture melamine from dicy at a plant to be located at a site other than Willow Island; or

(3) The lease of Willow Island for a term of five (5) years. Such lease shall be expressly conditioned upon the lessee undertaking to sell to Cyanamid its requirements in the United States for melamine, up to a maximum of thirty (30) million pounds per year, for a term of ten (10) years and further conditioned upon the lessee undertaking to construct, during such lease term, a plant ready for production of melamine by the time of expiration of the lease. Cyanamid shall furnish, at the lessee's option operating services (including but not limited to maintenance, utilities, steam, water, sewage disposal and the use of railroad siding and loading platforms) at cost, including reasonable overhead expense.

(C) Any proposal for such disposition by Cyanamid of Willow Island shall be subject to the approval of this Court, after hearing both plaintiff and defendant in regard thereto.

(D) Cyanamid shall reasonably cooperate with the vendee or lessee in the employment of personnel associated with the operation and management of Willow Island whom the vendee or lessee may desire to employ and shall release from any employment contract any such persons, who, within a reasonable time, not to exceed sixty (60) days after the consummation of the disposal, notify Cyanamid of their desire to accept such employment.

(E) For a period of one (1) year from the date of disposition of Willow Island; after receipt of a written request, Cyanamid is ordered and directed to make available at Willow Island a person or persons technically qualified in the manufacture of melamine from dicy by the process it used at Willow Island to supplement, explain or demonstrate the technical information to be supplied under Section X of this Final Judgment for the purpose of assisting the acquirer. For each such person Cyanamid may charge an

amount not to exceed his traveling and living expenses and the actual cost to Cyanamid for the time involved.

(F) Cyanamid shall, at acquirer's option, agree with the acquirer to do the following:

(1) Purchase a minimum of fifty percent (50%) of Cyanamid's melamine requirements in excess of its own melamine production at the prevailing market price for melamine produced in the United States for a term not exceeding ten (10) years;

(2) Furnish at cost engineering and technical assistance in connection with the establishment and start-up operations of a new plant to produce melamine; and

(3) Furnish a list of purchasers of melamine from Cyanamid during the twelve (12) months next preceding the date of entry of this Final Judgment, and for a term of five (5) years after said entry refer some or all orders for or inquiries about melamine to said acquirer notwithstanding the provisions of subsection (A) of Section VII of this Final Judgment.

(C) Cyanamid may, at acquirer's option, agree with the acquirer to operate Willow Island for the account of such acquirer for a term of five (5) years.

V

(A) From the date of entry of this Final Judgment and for a period of ten (10) years from the date of disposition of Willow Island, or until melamine production capacity in the United States (other than melamine producing capacity of any co-conspirator and of Cyanamid) shall be increased by a total of more than twenty-five (25) million pounds per year over the total of such capacity at the date of disposition, but in no event for a period of less than five (5) years, Cyanamid is enjoined and restrained from:

(1) Expanding its production capacity in the United States for melamine beyond thirty (30) million pounds a year; and

(2) Producing in the United States in any calendar year from said date of disposition of Willow Island more than thirty (30) million pounds of melamine. In computing such production in any year, the amount of Cyanamid's melamine imports in the preceding calendar year of melamine made by Cyanamid outside the United States shall be deemed to be a part of Cyanamid's production.

(B) From the date of disposition of Willow Island, Cyanamid is enjoined and restrained from the manufacture of melamine in Willow Island, except as permitted by subsection (G) of Section IV of this Final Judgment.

(C) Cyanamid is ordered and directed to purchase an amount of melamine equivalent to the requirements of Cyanamid for melamine for use in its production of laminates in accordance with Section XI of this Final Judgment.

VI

(A) Cyanamid is enjoined and restrained from directly or indirectly, entering into, performing, adhering to, maintaining or furthering, or claiming any rights under any combination, conspiracy, contract, agreement, arrangement or understanding with any person to:

(1) Allocate or divide customers, territories or markets for the manufacture, sale or distribution of dicy, melamine, any melamine resin or any product containing any of them;

(2) Eliminate, limit, restrain or prevent competition, or leave any person free from competition, in the manufacture, use, sale or distribution of dicy, melamine, any melamine resin or any product containing any of them;

(3) Limit, restrain or prevent importation into or exportation from the United States of dicy, melamine, any melamine resin or any product containing any of them;

(4) Boycott or otherwise refuse to do business with any person engaged in the manufacture, use, distribution or sale of dicy, melamine, any melamine resin or any product containing any of them;

or attempting to do anything forbidden in this subsection (A).

(B) Nothing in this Section VI shall be deemed to prohibit Cyanamid from making any arrangements or agreements with respect to activities carried on elsewhere than in the United States which do not have the purpose or effect of restraining or monopolizing the domestic or foreign commerce of the United States; *provided, however*, that in any civil proceedings instituted by either party hereto involving this Section VI because of arrangements or agreements with respect to activities carried on in countries other than the United States, the burden of proof shall be upon Cyanamid to establish that such arrangements or agreements do not restrain or monopolize the domestic or foreign commerce of the United States.

VII

Cyanamid is enjoined and restrained from:

(A) Referring or attempting to refer

(1) Any order or any potential order for dicy, melamine, any melamine resin or any product containing any of them to any co-conspirator or to any person in the United States which is engaged in the manufacture thereof, or is an agent or sales representative of any such co-conspirator or such manufacturer; or

(2) Any inquiry or request for literature or information relating to dicy, melamine, any melamine resin or any product containing any of them to any co-conspirator or any agent or sales representative of any such co-conspirator;

(B) Utilizing as a distributor or agent for the distribution or sale of dicy, melamine, any melamine resin or any product containing any of them:

(1) Any co-conspirator or any person known by Cyanamid to be a sales agent of a co-conspirator; or

(2) Any person, in any country outside the United States, engaged in the manufacture thereof or any person known by Cyanamid to be a sales agent of any such person

where the purpose or effect is to restrain the trade or commerce of the United States;

(C) Utilizing as an agent for the distribution or sale of dicy, melamine or any melamine resin any person in the United States engaged in the manufacture thereof or any person known by Cyanamid to be a sales agent of any such person;

(D) Acting as a distributor or agent for the sale or distribution of dicy, melamine, any melamine resin or any product containing any of them for

(1) any co-conspirator;

(2) any person engaged in the United States in the manufacture or distribution thereof; or

(3) any person in any country outside the United States engaged in the manufacture or distribution thereof where the purpose or effect is to restrain the trade or commerce of the United States;

(E) Coercing or attempting to coerce any person not to engage in the manufacture, use or sale of dicy, melamine, any melamine resin or any product containing any of them; or

(F) Restricting or limiting or attempting to restrict or limit the uses to which dicy, melamine, any melamine resin or any product containing any of them may be put after sale thereof.

VIII

Cyanamid is enjoined and restrained from:

(A) Refusing to sell dicy or any melamine resin to any person in the United States willing and financially able to purchase the same, at prices and on terms and conditions of sale corresponding to those regularly offered by Cyanamid to purchasers thereof in the United States of the same classification, except as such refusal may be required by Section VII of this Final Judgment; or

(B) fixing or determining the differential between the prices charged by Cyanamid for dicy and the prices charged by Cyanamid in the United States for melamine or melamine resins for the

purpose, or with the natural and probable effect, of restraining trade or commerce in melamine or melamine resins in the United States.

IX

(A) Cyanamid is ordered and directed to grant to any applicant making written request therefor a non-exclusive and unrestricted license or sublicense for the life of the patent, under any, some or all applicable Present Patents, to

(1) make and sell dicy;

(2) make and sell melamine from dicy;

(3) make and sell any melamine resin; and

(4) use any melamine resin;

and under any, some or all applicable Future Presents, to

(a) make and sell dicy; and

(b) make and sell melamine from dicy.

Each such license or sublicense shall be royalty-free.

(B) Cyanamid is ordered and directed to grant to any applicant making written request therefor a non-exclusive and unrestricted license or sublicense for the life of the patent, under

(1) any, some or all Present Patents and Future Patents to make and sell melamine from urea; and

(2) any, some or all Future Patents to

(a) make and sell any melamine resin; and

(b) use any melamine resin;

without any limitation or condition whatsoever except that:

(a) The license may be non-transferable;

(b) a reasonable and non-discriminatory royalty may be charged;

(c) Reasonable provisions may be made for periodic royalty reports by the licensee to Cyanamid and inspection of the books and records of the licensee by an independent auditor acceptable to both Cyanamid and

the licensee, who shall report to Cyanamid only the amount of the royalty due and payable;

(d) Reasonable provisions may be made for cancellation of the license upon failure of the licensee to make the reports, pay the royalties, or permit inspection of the books and records as herein provided; and

(e) The license must provide that the licensee may cancel the license at any time after one (1) year from the initial date thereof by giving to Cyanamid thirty (30) days' notice in writing.

(C) Upon receipt of a written request for a license under subsection (B) above, Cyanamid shall advise the applicant of the royalty it deems reasonable for such patent or patents to which the application pertains. If Cyanamid and the applicant are unable to agree within ninety (90) days upon what constitutes a reasonable royalty the applicant shall have those rights under such patent or patents to which its application pertains, without the payment of royalty or other compensation as though a license had issued. Cyanamid or the applicant may apply to this Court, upon notice to the plaintiff, for a determination of a reasonable royalty. In such proceeding the burden of proof shall be upon Cyanamid to establish the reasonableness of any royalty requested. Pending the completion of any such court proceeding, Cyanamid or the applicant may, upon notice to the plaintiff, apply to this Court to fix an interim royalty rate, pending final determination of what constitutes a reasonable royalty. If this Court fixes such interim royalty rate, a license shall then issue providing for the periodic payment of royalties at such interim rate from the date of the making of such application by the applicant, and whether or not such interim rate is fixed, any final order may provide for such adjustments including retroactive royalties, as this Court may order after final determination of a reasonable royalty.

(D) The taking of a license pursuant to this Final Judgment shall not be construed as preventing any person from attacking, at any time, the validity or scope of any of said patents nor shall this

Final Judgment be construed as imputing any validity or value to any of said patents.

(E) Cyanamid is enjoined and restrained from disposing of any of said patents, or rights thereunder, so as to deprive it of the power to grant licenses as required by this Section IX unless it be a condition of such disposition that the transferee shall observe the provisions of said Section IX with respect to the patents and rights so acquired and shall file with this Court, prior to such disposition, an undertaking to that effect.

(F) Cyanamid is enjoined and restrained, for a period of five (5) years from the date of entry of this Final Judgment, from inquiring, directly or indirectly, title to, or any interest in, or license under any United States Letters Patent unless

(1) Cyanamid also obtains the right to issue licenses under such patents as required by this Section IX; or

(2) Cyanamid has acquired a non-exclusive right or license and shall have made a *bona fide* effort (not including additional monetary consideration) to persuade the licensor to make available to any third person requesting the same, a right or license equivalent to that required of Cyanamid by this Section IX and on terms and conditions at least as favorable as those accorded to Cyanamid.

(G) At the time of the granting of a license or sublicense under this Section IX, Cyanamid shall also grant to the licensee, to the extent Cyanamid has the right to do so, an unrestricted unconditional, non-exclusive and a royalty-free grant of immunity under any, some, or all foreign patents with respect to products manufactured under such license or sublicense, and Cyanamid is enjoined and restrained from selling or otherwise disposing of the right to grant immunities under any patent as provided in this subsection (G).

X

(A) Cyanamid is ordered and directed for a period of ten (10) years from the date of entry of this Final Judgment, upon

payment to Cyanamid of its cost of compilation to furnish, upon written request;

(1) To any person engaged or desiring to engage in the United States in the manufacture of dicy, melamine or any melamine resin or melamine resins (a) all technical information, which Cyanamid has and which Cyanamid has the right to furnish on the date of entry of this Final Judgment, usable for the manufacture of, and which will enable such person to manufacture commercially dicy, melamine from dicy and any such melamine resin or resins; and (b) such additional technical information relating to the use of such melamine resin or resins as Cyanamid has furnished to its customers in the United States;

(2) To any licensee under Section IX of this Final Judgment engaged or desiring to engage in the United States in the manufacture or use of dicy, melamine or any melamine resin all technical information, which Cyanamid has and (a) which Cyanamid acquires within five (5) years from the date of entry of this Final Judgment and (b) which Cyanamid has the right to furnish at such time, reasonably necessary to enable the licensee to practice the invention or inventions under the licensed patent or patents.

(B) Cyanamid may, as a condition to furnishing such technical information pursuant to subsection (A) above, require the person to whom it is furnished to agree in writing to keep such technical information confidential and to use such technical information received pursuant to subsection (A) above only for its own manufacture or use in the United States, and Cyanamid may, as a condition to furnishing such technical information hereafter acquired by Cyanamid require such person to agree in writing not to advertise or use the fact that it has received such technical information from Cyanamid in the sale of its products.

(C) Cyanamid shall not be deemed, in connection with the furnishing of technical information pursuant to this Section X of

this Final Judgment, to have given any warranty against infringement of patents, or any warranty of success in connection with the use of such information.

(D) In the event of disagreement as to either the amount of the cost of compilation charges payable to Cyanamid or reasonable royalty under this Section X of this Final Judgment, the matter shall be determined in the manner set forth in subsection (C) of Section IX of this Final Judgment.

(E) Cyanamid is enjoined and restrained from making any disposition of any such technical information, used or usable, on any basis which would restrict Cyanamid from complying with any of the provisions of this Section X with respect to such information unless it be a condition of such disposition that the transferee shall observe the provision of said Section X with respect to such information and shall file with this Court, prior to such disposition, an undertaking to that effect.

XI

(A) Commencing with the date of the disposition of Willow Island, Cyanamid is ordered and directed to purchase annually from other producers of melamine (with the preference to United States producers) an amount of melamine equivalent to the requirements of Cyanamid for melamine for use by Cyanamid in the production of laminates in the United States provided that at any time after ten (10) years from such date, Cyanamid may petition to this Court to be relieved from this provision, such relief to be granted upon a showing by Cyanamid to the satisfaction of this Court that the effect of such relief will not be substantially to lessen competition or tend to create a monopoly in any line of commerce in any section of the country. Cyanamid's requirements for the purposes of this Section XI shall be deemed to be an amount of melamine of all grades, but not superior to that customarily used by Cyanamid in the manufacture of laminates, at least equivalent to the amount of such melamine used by Cyanamid in its production of laminates during the preceding calendar year.

(B) Cyanamid is directed to file with the Court, and serve a copy on plaintiff, an affidavit setting forth all the facts justifying any failure to purchase its melamine requirements in accordance with subsection (A) above. Such affidavit shall be filed within thirty (30) days after said failure.

(C) In the event Cyanamid considers that the exclusive price offered for its purchase pursuant to subsection (A) hereof is oppressively high, Cyanamid may apply to the Court, and upon a showing by Cyanamid to the satisfaction of this Court that the price is non-competitive, the Court may grant such protective order as the Court deems appropriate.

XII

Cyanamid is ordered to publish in the trade journal called Oil, Paint & Drug Reporter within ninety (90) days after the entry of this Final Judgment a notice and advertisement to the following effect:

(1) Cyanamid will grant licenses under its patents to make, use and sell dicy, melamine and melamine resins in accordance with subsections (A) and (B) of Section IX of this Final Judgment;

(2) Cyanamid will sell dicy and melamine resins made by it in accordance with subsection (A) of Section VIII of this Final Judgment; and

(3) Cyanamid will furnish technical information in accordance with Section X of this Final Judgment.

XIII

(A) For a period of ten (10) years from the date of entry of this Final Judgment, Cyanamid is enjoined and restrained from acquiring, directly or indirectly, any of the assets (except goods or products bought in, or incidental to, the ordinary course of business), business or goodwill of, or any of the shares of stock or other financial interest in, any person engaged in the manufacture or sale in the United States of dicy, melamine, any melamine resin, laminates, molding compounds or the end products made

from such molding compounds; *provided, however*, that Cyanamid may acquire those assets, business and goodwill of such person which are not employed in the manufacture or sale in the United States of dicy, melamine, any melamine resin, laminates, molding compounds or the end products made from such molding compounds, with the consent of the plaintiff or upon a showing to the satisfaction of this Court that the effect of such acquisition will not be to eliminate or adversely affect such person in his manufacture, use or sale of melamine, or any melamine resin or any product containing either or both of them.

(B) For a ten (10) year period, after the ten (10) year period provided for in subsection (A) above, Cyanamid is enjoined and restrained from acquiring directly or indirectly, any of the assets (except goods or products bought in, or incidental to, the ordinary course of business), business or goodwill of, or any of the shares of stock or other financial interest in, any such person in the United States except with the consent of plaintiff or upon a showing to the satisfaction of this Court that the effect of any such acquisition will not be substantially to lessen competition or to tend to create a monopoly in the manufacture or sale of dicy, melamine, melamine resins, laminates, molding compounds or the end products made from such molding compounds in any line of commerce in any section of the country.

(C) For a period of twenty (20) years from the date of entry of this Final Judgment, Cyanamid is, subject to the terms of subsections (A) and (B) above, enjoined and restrained from acquiring, directly or indirectly, any of the assets (except goods or products bought in, or incidental to, the ordinary course of business), business or goodwill of, or any of the shares of stock or other financial interest in, any person engaged in the United States in the manufacture of products of which a functionally significant ingredient is melamine or melamine resins except with the consent of the plaintiff or upon a showing to the satisfaction of this Court that the effect of any such acquisition will not be substantially to lessen competition in, to tend to create a monopoly in or unreasonably restrain the trade or commerce of the

United States in the manufacture, use or sale of any such products.

(D) For a period of twenty (20) years from the date of entry of this Final Judgment, Cyanamid is, subject to the terms of subsections (A), (B) and (C) above, enjoined and restrained from acquiring, directly or indirectly, any of the assets (except goods or products bought in, or incidental to, the ordinary course of business), business or goodwill of, or any of the shares of stock or other financial interest in, any person engaged in any country outside the United States in the manufacture or sale of dicy, melamine, any melamine resins, laminates, molding compounds or the end products made from such molding compounds where the effect of such acquisition will be substantially to lessen competition in, to tend to create a monopoly in or unreasonably to restrain the trade or commerce of the United States in the manufacture, use or sale of any of them, except

(1) As to companies engaged in such manufacture or sale in North America, exclusive of the United States after establishing to the satisfaction of this Court that the effect of any such acquisition will not be substantially to lessen competition in, to tend to create a monopoly in or unreasonably restrain the trade or commerce of the United States as aforesaid; and

(2) As to companies engaged in such manufacture or sale outside North America (inclusive of the United States), Cyanamid shall promptly notify the Attorney General of the United States of any acquisition of such assets, business or goodwill of, or any of the shares or stock or other financial interest in, any such person so engaged as aforesaid, together with a written statement setting forth the basis for its conclusion that any such acquisition will not substantially lessen competition in, tend to create a monopoly in, or restrain the trade or commerce of the United States as aforesaid; and in any proceeding for civil contempt based upon an alleged violation of this subparagraph (2) of subsection (C) of this Section XIII by reason

of an acquisition, the burden of proof shall be on Cyanamid to establish that the acquisition will not substantially lessen competition in, tend to create a monopoly in, or restrain the trade or commerce of the United States as aforesaid.

(E) Nothing contained in this Section XIII shall be construed to prohibit:

(1) Acquisition by Cyanamid solely for investment and inclusion in its Pension Fund of not more than a total of one percent (1%) of the securities, shares of stock or other financial interest in any person; and

(2) Maintaining Cyanamid's present proportionate interest in any person not a subsidiary.

XIV

For the purpose of assuring compliance with this Final Judgment and subject to any legally recognized privilege, duly authorized representatives of the Department of Justice shall, upon written request of the Attorney General or the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to Cyanamid made to its principal office, be permitted:

(A) Access during the office hours of Cyanamid to those parts of the books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of Cyanamid which relate to any of the matters contained in this Final Judgment;

(B) Subject to the reasonable convenience of Cyanamid and without restraint or interference from it, to interview officers or employees of Cyanamid, who may have counsel present.

Upon such written request Cyanamid shall submit such reports in writing to the Department of Justice with respect to matters contained in this Final Judgment as may from time to time be necessary to the enforcement of this Final Judgment.

No information obtained by the means provided in this Section XIV shall be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of the Executive Branch of the plaintiff except in the course of legal proceedings to which the United States of America is a party for the purpose of securing compliance with this Final Judgment or as otherwise required by law.

XV

Jurisdiction is retained for the purpose of enabling either of the parties to this Final Judgment to apply to this Court at any time for such further orders and directions as may be necessary or appropriate for the construction or carrying out of this Final Judgment or for the modification or termination of any of the provisions thereof, and for the enforcement of compliance therewith and punishment of violations thereof.

Dated: August 4, 1964

/s/ RICHARD H. LEVET

United States District Judge

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, *Plaintiff.* —*against*— AMERICAN CYANAMID COMPANY, *Defendant.*	60 Civ. Action No. 3857 Filed: _____

COMPLAINT

The United States of America, by its attorneys acting under the direction of the Attorney General of the United States, brings this action against the defendant named herein, and complains and alleges as follows:

I

JURISDICTION AND VENUE

1. This complaint is filed and this action is instituted against the defendant named herein under Section 4 of the Act of Congress of July 2, 1890, c. 647, 26 Stat. 209, as amended (15 U.S.C. Sec. 4), entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," commonly known as the Sherman Act and under Section 15 of the Act of Congress of October 15, 1914, c. 323, 38 Stat. 736, as amended, entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," commonly known as the Clayton Act, in order to prevent and restrain continuing violations by the defendant, as hereinafter alleged, of Sections 1 and 2 of the Sherman Act and Section 7 of the Clayton Act.

2. The defendant maintains an office, transacts business and is found within the Southern District of New York.

II

THE DEFENDANT

3. The American Cyanamid Company is hereby made a defendant herein. It is a corporation organized and existing under the laws of the State of Maine and has its principal place of business at 30 Rockefeller Plaza, New York, New York. It is engaged in the business of manufacturing and selling, among other things, melamine and melamine containing products.

4. The acts alleged in this complaint to have been done by defendant were ordered or done by its officers, agents or employees while actively engaged in the management, direction and control of the affairs of the defendant.

III

THE CO-CONSPIRATORS

5. The corporations listed below are hereby named co-conspirators herein. Each of the corporations was organized and exists under the laws of the State, and has its principal place of business, as indicated below. Each of the said corporations is engaged, among other things, in the business of manufacturing and selling melamine and melamine containing products.

Name of Corporation	Place of Incorporation	Principal Place of Business
Monsanto Chemical Co. (hereinafter referred to as "Monsanto")	Delaware	800 N. Lindbergh Blvd. St. Louis, Missouri
Ciba Ltd.	Organized and existing under the laws of Switzerland	Basle, Switzerland
Ciba Products Corp. [A subsidiary of Ciba States Ltd., 260 Madison Avenue, New York, New York, which is a holding company subsidiary of Ciba Ltd.]	Delaware	Fairlawn, New Jersey
British Industrial Plastics, Ltd.	Organized and existing under the British Companies Act	London, England
Societé des Produits Azotes	Organized and existing under the laws of France	Paris, France
The British Oxygen Company, Limited	Organized and existing under the British Companies Act	London, England

Other persons, firms and corporations, to the plaintiff unknown, have participated as co-conspirators with the defendants in the offenses hereinafter alleged, and have performed acts and made statements in furtherance of said offenses.

IV

DEFINITIONS

6. "Dicyandiamide" (hereinafter referred to as "dicy"), as used herein, is the basic raw material from which melamine has been commercially produced. The basic ingredient of dicy is limestone, which is chemically changed through the application of heat, electricity, pressure and the addition of other substances.

7. "Melamine," as used herein, means the chemical, a trimer of cyanamid, which may be designated as 2,4, 6, -triamino-1,3,5,-triazine, having a specified formula. Physically, commercial

melamine is a fine white crystalline powder with a molecular weight of 126.13 and a melting point of approximately 350° C. It weighs about 53 pounds per cubic foot, and is sparingly soluble in cold water but will dissolve to about a 5% solution in water at 100° C.

8. "Melamine resin," as used herein, means a reaction product of melamine and an aldehyde.

9. "Molding compound," as used herein, means a composition, containing melamine resin, which is customarily formed, shaped, and set under the combined action of heat and pressure. Molding compounds often contain a filler, such as alpha-cellulose, wood-flour, cotton flock or chopped fabric, mineral fibre or other material. Molding compounds are often used to manufacture dinnerware, electrical parts, and buttons. The articles so formed, shaped, or set are not included within the term. The composition affords dinnerware outstanding resistance to chemicals, impact resistance, high surface hardness and excellent color range.

10. "Textile resins," as used herein, means a composition, containing melamine resin, which is customarily used to treat textile fabrics, yarns or fibres, in order to impart a desired characteristic to the textile product. The term does not include the material so treated. The characteristics imparted to the textile fabrics, yarns and fibres treated with textile resins include: wrinkle resistance, water repellency, shrink resistance, and flame resistance.

11. "Paper resins," as used herein, means a composition, containing melamine resin, which is customarily used to treat paper, pulp or fibre used in the manufacture of paper or tissue to impart a particular characteristic, such as wet-strength, to the product. The term does not include the material so treated.

12. "Coating resins," as used herein, means a composition, containing melamine resin, used to deposit continuous adherent exterior films, on surfaces for purposes of decoration or protection. The term includes primers, putties, surfaces, topcoatings and printing inks, but does not include the articles so treated. Characteristics of the finishes obtained through the use of coating

resins include durability, high gloss and superior retention of such qualities.

13. "Bonding resins," as used herein, means a composition, containing melamine resin, used as an adhesive for the bonding of layers or parallel surfaces without involving intentional impregnation of the materials to be bonded, where all exterior surfaces retain the characteristics of the material bonded. The term does not include the articles so bonded. Some uses of bonding resins include production of plywood and furniture veneers, especially where water resistance is important.

14. "Laminating resins," as used herein, means a composition, containing melamine resin, which is customarily used for the formation, under the combined action of heat and pressure, of composite assemblies composed of superimposed layers of material, where an exterior surface partakes to a substantial degree of the characteristics of the melamine resin composition so used. Laminating resins are often used to manufacture table tops, kitchen counters, bar tops, wall surfaces, furniture surfaces and boats. The articles so made are not included within the term. The composition imparts to these products chemical and heat resistance, resistance to water, shatter resistance, high electrical arc resistance, and clarity of decorative effects.

15. "Laminates," as used herein, means the articles formed by the combined action of heat and pressure on composite assemblies composed of superimposed layers of material where an exterior surface takes a substantial degree of the characteristics of laminating resin.

16. "Melamine containing products," as used herein, means that group of synthetic intermediary products of which a basic ingredient is melamine. In the normal course of business these intermediary products are further processed to form the finished consumer product, or are applied to other products to impart desired qualities. In general, melamine containing products consist of the melamine resins and compounds hereinabove defined in paragraphs 9 through 14.

V

NATURE OF TRADE AND COMMERCE

17. Melamine was first produced in or about 1834. Its commercial use, however, did not become practical until the development in or about 1937 of a practical process for manufacturing melamine from dicy.

18. There are several processes, patented and unpatented, for the manufacture of melamine from dicy as well as from other raw materials. During all of the period covered by this complaint, the commercial production of melamine utilized dicy as its principal raw material. Substantially all of the dicy produced in North America is manufactured by the defendant.

19. The defendant uses most of the dicy it manufactures in the production of melamine which it sells to other chemical companies who use the melamine in the manufacture of one or more melamine containing products. The defendant sells a portion of its dicy to Monsanto which uses the dicy only to manufacture melamine for Monsanto's own use in its manufacture of certain kinds of melamine containing products. The defendant also manufactures other kinds of melamine containing products and uses a substantial portion of the melamine which it produces for that purpose. Melamine containing products are sold to manufacturers of textiles, dinnerware, electrical apparatus, laminates, paper and other articles manufactured for sale to ultimate consumers.

20. Within the period covered by this complaint, virtually all melamine containing products manufactured in the United States were manufactured under patents and patent rights owned or controlled by the defendant.

21. In 1958 the defendant produced approximately 50,000,000 pounds of melamine which represented over 50% of all the melamine produced in the world and 86% of the melamine produced in the United States. It has been the sole producer of melamine for sale in the United States. Monsanto produced approximately

9,500,000 pounds or approximately 14% of the melamine produced in the United States which it did not resell but utilized for the production of melamine containing products. The defendant is Monsanto's sole supplier of dicy for the production of melamine.

22. In 1958, the domestic sales of melamine containing products amounted to 98,776,000 pounds valued at $39,373,000. Of this amount the defendant sold 59,266,000 pounds of melamine containing products valued at $23,624,000 or approximately 60%.

23. Melamine, melamine containing products and laminates are sold and shipped in interstate commerce to customers located in various states of the United States other than the states wherein melamine, melamine containing products, and laminates, are produced.

VI

OFFENSES CHARGED

24. Beginning in or about 1937 and continuing thereafter up to and including the date of the filing of this complaint, the defendant and the co-conspirators have been engaged in an unlawful combination and conspiracy to restrain and to monopolize interstate and foreign trade and commerce in melamine and melamine containing products in violation of Sections 1 and 2 of the Sherman Act.

25. Beginning in or about 1937 and continuing to the date of the filing of this complaint, the defendant has attempted to monopolize and has monopolized interstate and foreign trade and commerce in melamine and melamine containing products in violation of Section 2 of the Sherman Act.

26. The aforesaid combination and conspiracy to restrain and to monopolize has consisted of a continuing agreement and concert of action between defendant and co-conspirators, the substantial terms of which have been and are that:

(a) World markets for the manufacture, sale and distribution of melamine and melamine containing products shall be allocated; and

(b) The defendant shall have the power to determine who shall make, use, or sell melamine and melamine containing products in the United States.

27. Pursuant to and in effectuation of the offenses alleged in paragraph 25 of this complaint, the defendant, among other things:

(a) Did those things which, as hereinabove alleged in paragraph 26, it combined and conspired with the co-conspirators to do;

(b) Suppressed the exploitation and use of processes for the manufacture of melamine from raw materials other than dicy;

(c) Refused to sell dicy for use in the manufacture of melamine to be resold in competition with the defendant;

(d) Adjusted the differential between the price the defendant charged for melamine and the price it charged for dicy, or threatened to do so, for the purpose of discouraging the production of melamine in the United States by anyone other than the defendant;

(e) Adjusted the differential between the price the defendant charged for melamine containing products and the price it charged for melamine, or threatened to do so, for the purpose of discouraging the production of melamine by anyone other than the defendant;

(f) Disseminated information that it would decrease the price of melamine for the purpose of discouraging potential competitors from engaging in the sale and distribution of melamine;

(g) Acquired patents and utilized patent sublicensing:

(1) to maintain and preserve its dominant position in the field of melamine and melamine containing products, and

(2) to allocate fields in the manufacture, sale and distribution of melamine containing products;

(h) Caused foreign manufacturers of melamine to refuse to sell to anyone in the United States failing to abide by restrictions imposed by the defendant;

(i) Acquired the Formica Company, a corporation engaged in the manufacture, sale and distribution of laminates, and a leading consumer of laminating resins, for the purpose of foreclosing others from opportunities to make sales of melamine or melamine containing products to such company; and

(j) Acquired the Panelyte Division of the St. Regis Paper Co. (Canada) Ltd., a corporation engaged in the manufacture, sale and distribution of laminates with a laminating plant at St. Jean, Quebec, and a leading consumer of laminating resins, for the purpose of foreclosing others from opportunities to make sales of melamine or melamine containing products to such company.

28. The effect of the acquisitions by the defendant of the Formica Company and of the Panelyte Division of the St. Regis Paper Co. (Canada) Ltd., both of which are engaged in commerce in the United States, may be to substantially lessen competition or tend to create a monopoly with respect to trade and commerce in the United States in melamine, laminating resins and laminates, in violation of Section 7 of the Clayton Act, in the following ways, among others:

(a) Formica Company and Panelyte Division of the St. Regis Paper Co. (Canada) Ltd. will be permanently eliminated as substantial independent competitive factors in the manufacture of laminating resins and laminates for sale or use in the United States.

(b) Manufacturers of melamine or laminating resins, other than defendant, have been precluded from competing with it for the sale of such products to Formica Company and Panelyte Division of the St. Regis Paper Company (Canada) Ltd.

(c) Competition between Formica Company and Panelyte Division of the St. Regis Paper Company (Canada) Ltd. will be eliminated.

29. The violations alleged in paragraphs 24, 25 and 28 of this complaint are continuing and will continue unless the relief sought is granted.

VII

EFFECTS

30. The aforesaid offenses charged in paragraphs 24 and 25 have had, among other things, the following effects:

(a) Prices of melamine, melamine containing products and consumer products made therefrom have been maintained at unreasonably high and artificial levels.

(b) Effective competition between manufacturers of melamine containing products has been suppressed.

(c) Actual and potential foreign and domestic competition in melamine has been foreclosed.

(d) Progress in the development of manufacturing melamine from materials other than dicy has been suppressed.

(e) Progress in the development of new uses for melamine has been discouraged and impeded to the detriment of the public interest.

(f) The public has been deprived of an ample supply of melamine and melamine containing products.

PRAYER

WHEREFORE, the plaintiff prays:

1. That the Court adjudge and decree that defendant and coconspirators have combined and conspired to restrain and to monopolize interstate and foreign trade and commerce in melamine and melamine containing products in violation of Sections 1 and 2 of the Sherman Act.

2. That the Court adjudge and decree that defendant has attempted to monopolize and has monopolized interstate and foreign trade and commerce in melamine and melamine containing products in violation of Section 2 of the Sherman Act.

3. That the acquisition by the defendant of the Formica Company and the Panelyte Division of St. Regis Paper Co. (Canada), Ltd. be adjudged a violation of Section 7 of the Clayton Act.

4. That the defendant, its officers, agents, directors and employees and all persons acting or claiming to act on its behalf be perpetually enjoined and restrained from carrying out, directly or indirectly, the aforesaid combination and conspiracy to restrain and to monopolize, attempt to monopolize, and the monopolization of interstate and foreign trade and commerce in melamine and melamine containing products, and that defendant be perpetually enjoined from participating in agreements or understandings having the purpose or effect of continuing, reviving or renewing any of the aforesaid offenses or any offense similar thereto.

5. That the Court adjudge and decree that the defendant has used patents and patent rights unlawfully in instituting, effectuating and maintaining the combination and conspiracy to restrain and to monopolize and in attempting to monopolize, and monopolizing interstate and foreign trade and commerce in melamine and melamine containing products, and enter such orders relating to any and all present and future patents and patent rights as the Court may deem appropriate and necessary to dissipate the effects of the violations herein alleged, and to establish free and unfettered competition in the trade and commerce herein involved.

6. That the Court enter such orders as it may deem necessary to prohibit the defendant from continuing to engage in the business of manufacturing or selling melamine or melamine containing products as the Court may deem necessary and appropriate to dissipate the effects of the defendant's unlawful activities as hereinbefore alleged and to permit and restore competition in interstate and foreign commerce in melamine and melamine containing products.

7. That the Court prohibit defendant, for a reasonable time, from withholding for sale dicy, melamine and melamine containing products to any buyer willing to purchase the same at reasonable prices.

8. That the defendant be required to divest itself of ownership of Formica Company and the Panelyte Division of St. Regis Paper Company (Canada), Ltd.

9. That the defendant be required to take such other action as the Court may deem necessary and appropriate to dissipate the effects of its unlawful activities as hereinbefore alleged and to permit and restore competition in interstate and foreign trade and commerce in melamine and melamine containing products.

10. That the plaintiff have such other, further and different relief as the nature of the case may require and the Court may deem just and proper in the premises.

11. That the plaintiff recover the cost of this suit.

Dated: New York, New York
October 5, 1960

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FILED
FEB 16 1984
ALEXANDER L. STEVAS,
CLERK

No. 83-1085

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

AMERICAN CYANAMID COMPANY,
Petitioner,

v.

MELAMINE CHEMICALS, INC., *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

BRIEF IN OPPOSITION

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QUESTION PRESENTED

The antitrust consent decree at issue here requires petitioner, the nation's largest producer and user of melamine, to purchase significant volumes of melamine from other producers but permits petitioner to obtain relief from this requirement by showing that such relief "will not be substantially to lessen competition or tend to create a monopoly in any line of commerce . . . ." The decree provides no alternate standard for modification or termination.

The question presented is:

> Whether the court of appeals properly applied the express textual standard for termination contained in the decree or whether a lower "public interest" standard applies instead.

PARTIES TO THE PROCEEDING

The petitioner is American Cyanamid Company ("Cyanamid"), the defendant in the underlying civil antitrust case, *United States v. American Cyanamid Co.*, No. 60 Civ. 3857 (S.D.N.Y. filed Oct. 5, 1960). Respondent Melamine Chemicals, Inc. ("MCI") is jointly owned by Ashland Oil, Inc.* and First Mississippi Cor-

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* Pursuant to this Court's Rule 28.1, the following are non-wholly-owned subsidiaries or affiliates of Ashland Oil, Inc.:

Allemania Chemical Company
Applied Chemicals Products (Pty) Ltd.
Applied Foundry Products (Pty) Ltd.
Applied Industrial Products (Pty) Ltd.
Arch Mineral Corporation
Ashland Coal, Inc.
Ashland Croda Pty. Ltd.
Ashland-Avebene
Ashland-Suedchemie-Giesserei Chemikaline
Ashland-Suedchemie-Kernfest GmbH
B. V. Ashland-Suedchemie v/h Necof

[Continued]

poration.** MCI was not a party to the original action but was permitted to intervene in the 1982 proceedings on Cyanamid's motion to terminate the 1964 judgment which concluded the 1960 antitrust action against Cyanamid. The United States of America ("Government") was the plaintiff in that action and has been made a respondent here pursuant to Rule 19.6 of this Court.

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* [Continued]

Cumberland Materials, Inc.
Establissement Locab
500 Cary Corporation
Iberia Ashland Chemical S.A.
Mikro Pul GmbH
Mikro Pul-Duclone S.A.R.L.
Resource Sciences-Arabia Ltd.
Super Mom's Kitchens, Inc.
Travelers Inns of Charlotte, Inc.
Travelers Inns of Winston-Salem, Inc.
Travelers Inns of Wytheville, Inc.
U.S. Felt Company
WICMAP Transport Pty. Ltd.

** Pursuant to this Court's Rule 28.1, the following are non-wholly-owned subsidiaries or affiliates of First Mississippi Corporation:

Ammonia Producers
International Genetic Sciences Partnership
Triad Chemical

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IN THE

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---

BRIEF IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. A1-A22) is reported at 719 F.2d 558. The opinion of the District Court terminating the consent decree (Pet. App. A25-A46) is reported at 556 F. Supp. 361. The consent decree (Pet. App. A68-A86) was entered in August 1964 and is published at 1964 Trade Cas. (CCH) ¶ 71,166.

COUNTERSTATEMENT OF THE CASE

The Initial Complaint

The 1960 complaint (Pet. App. A87-A99) in this civil antitrust action charged Cyanamid with violations of Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2 (1982) and Section 7 of the Clayton Act, 15 U.S.C. § 18 (1982). The complaint alleged that Cyanamid and

others had conspired to restrain and monopolize trade in melamine[1] and that Cyanamid had illegally acquired the Formica Company, a "leading consumer" of melamine, "for the purpose of foreclosing others from opportunities to make sales of melamine or melamine containing products to such company" (Pet. App. A95). The complaint charged that Cyanamid's acquisition of Formica substantially lessened competition and tended to create a monopoly in violation of Section 7 of the Clayton Act (*id.*).

As a result of these violations, the complaint alleged that the prices of melamine and melamine-containing products were maintained at unreasonably high levels, that competition in the manufacture of melamine and melamine-containing products was lessened, that actual and potential competition in melamine was foreclosed, and that the public was deprived of an adequate supply of melamine and melamine-containing products (Pet. App. A96).

The Final Judgment

In August 1964, the Government's antitrust action against Cyanamid was settled by the entry of a final judgment (Pet. App. A68-A86). Although Cyanamid was not required to divest Formica, Part XI of the consent decree—the only provision of the decree now in issue—requires Cyanamid to purchase annually from other producers an amount of melamine equal to its domestic melamine requirements for the production of laminates, *i.e.*, the quantity of melamine required by its recently acquired Formica subsidiary (Pet. App. A81-A82). In making such purchases, Cyanamid is to give preference to United States melamine producers. The purpose of Part XI, as later articulated by the Government, is "to deny to Formica the benefits which might accrue from vertical integration with Cyanamid and to require Formica to compete worldwide for melamine with other

[1] Melamine is a substance used in the manufacture of high-pressure laminates and other plastic products.

producers of laminates."[2] In contrast to the decree's restrictions on Cyanamid's production of melamine, *see* Part V (Pet. App. A73-A74), which are expressly limited to a term of 10 years, the purchase requirement of Part XI operates in perpetuity unless Cyanamid meets the test for modification specifically set forth in Part XI.

Part XI permits Cyanamid to petition the Court for relief from its requirement any time after 10 years from the date of the decree.[3] The requested relief is to be granted only "upon a showing by Cyanamid to the satisfaction of [the] Court that the effect of such relief will not be substantially to lessen competition or tend to create a monopoly in any line of commerce or any section of the country" (*id.* at A81). This standard tracks the language of Section 7 of the Clayton Act—the provision of the antitrust laws which governs mergers and acquisitions and the statutory provision that the Government charged Cyanamid with violating when it acquired Formica. Part XI provides no alternate standard for termination when the Government consents to the relief requested. In stark contrast, other provisions of the decree which contain modification standards modelled on the language of Section 7 of the Clayton Act specifically provide, as an alternative, that the requirements of the decree may be modified if the Government consents to the relief requested (*see* Parts XIII (B), (C) and (D) (Pet. App. A83-A84)).

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[2] Memorandum of the United States in Opposition to the Application by American Cyanamid Company for a Protective Order Pursuant to Section XI(c) of the Final Judgment, November 14, 1974 at 3 (C.A. App. 73).

[3] The decree also allows Cyanamid to apply for relief at any time if it "considers that the melamine price offered for its [required] purchase" under Part XI is "oppressively high." The decree provides that relief from high prices will be granted if Cyanamid could show "to the satisfaction of [the] Court that the price is noncompetitive" (Pet. App. A82). In seeking to terminate the decree, Cyanamid has not claimed that the price which it pays for melamine purchased pursuant to Part XI is noncompetitive.

Proceedings on Cyanamid's Motion to Terminate the Consent Decree

On August 6, 1982, Cyanamid, with the consent of the Government, moved to terminate those provisions of the 1964 decree that were still in effect. Pursuant to notice requesting comments, MCI, a producer of melamine, Dart Industries, a plastic laminates producer, and Plastics Manufacturing, Inc., a producer of melamine resins for plastic laminates, all filed comments opposing the proposed termination.[4]

MCI's principal objection to termination of the decree was that elimination of the outside purchase requirement of Part XI would permit Cyanamid, the nation's largest producer of melamine, to consummate its acquisition of Formica, the nation's largest user of melamine, thereby foreclosing competitors of Cyanamid from the opportunity to sell melamine to Formica. As a result, competition in the production and sale of melamine and melamine-containing products would be substantially lessened. In support of its contention, MCI demonstrated that the markets for melamine and melamine-containing products are highly concentrated, that the degree of vertical integration between those markets is high, that there are substantial barriers to entry in the production of melamine, that Cyanamid (and its Formica subsidiary) has substantial market power at each market level and that, as a result of the inevitable vertical

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[4] The District Court granted motions to intervene filed by MCI and Dart (Pet. App. A47-A54). The Court found that MCI had relied upon the provisions of the consent decree in entering the melamine industry, that there was a "close relationship" between MCI's claims and the main issue before the Court, and that permissive intervention "will not unduly delay or prejudice the original parties" to the litigation (*id.* at A53-A54). In "light of the unusual factual setting," the Court found that MCI should be permitted to intervene (*id.* at A54).

integration between Cyanamid and Formica, substantial foreclosure of competition is likely.[5]

The Decision of the District Court

On January 10, 1983, in a Memorandum Decision, the District Court ruled that termination of the decree was "in the public interest" (Pet. App. A34, A41). With respect to the termination of Part XI, the District Court declined to apply the "higher standard of proof" for modification specifically set forth in that provision, *i.e.*, that Cyanamid show that termination would not substantially lessen competition or tend to create a monopoly (*id.* at A34). Despite the fact that the express textual standard contained in Part XI was unqualified and, by its terms, applied whenever *any* modification was requested, the District Court ruled that it did not apply when the Government consented to the relief sought (*id.*).

The Memorandum Decision did not clearly state the basis of the District Court's conclusion that termination of the decree was "in the public interest." However, it appeared that the Court relied on certain alleged changes in the melamine industry since entry of the consent decree in 1964 (Pet. App. A31-A32, A41) and on "[c]ontemporary economic theory" which, in the District Court's view, "recognizes that vertical integration may foster corporate efficiency and *enhance* competition in the market place" (*id.* at A37) (emphasis in original). In discussing the probable consequences of vertical integration of Cyanamid and Formica, the District Court relied upon its understanding of what a hypothetical "rational" manager of Cyanamid's melamine operations or Formica's

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[5] Neither Cynamid nor the Government disputed MCI's contention that the extent of vertical integration arising from the consummation of Cyanamid's acquisition of Formica was substantially greater than that present in any judicially approved acquisition.

purchasing division should do (Pet. App. A37-A38, A40 n.7).[6]

The Decision of the Court of Appeals

Finding that the District Court had failed to apply the proper standard for termination of Part XI of the decree, the United States Court of Appeals for the Second Circuit reversed the decision to terminate and remanded the case to the District Court for further findings.[7] The Court of Appeals found that the explicit language of Part VI "unambiguously" provides that, in order to modify or terminate this provision, Cyanamid must show that the relief requested "will not be substantially to lessen competition or tend to create a monopoly" (Pet. App. A14). Because "[n]o provision has been made to apply a different standard where the Government joins in a motion to terminate" Part XI of the decree (*id.* at A15), the Court of Appeals held that the District Court erred in failing to apply the standard for modification set forth in the text of the decree.

Looking beyond the "four corners" of Part XI to the context of the overall decree and the underlying regulatory statute, the Court of Appeals also found that termination of Part XI under the "public interest" test urged by Cyanamid required reference to the standard set forth in Section 7 of the Clayton Act and incorporated in the

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[6] The District Court also found "that an abrupt termination [of the purchase requirement of Part XI] will have an adverse impact on MCI of a serious nature" (Pet. App. A41), and that, as a Court of Equity, it should provide some "period of time for a gradual phasing out of the purchase requirement" (*id.* at A41, A44). However, solely "in light of the inability of the parties to agree on a gradual phased in termination" of purchases and the "judicial impossibility" of determining a reasonable period of time for such a gradual phase-out, the Court ordered that the decree be terminated immediately, effective January 1, 1983 (*id.* at A44, A45).

[7] The Court of Appeals affirmed the decision permitting MCI to intervene. The propriety of this aspect of the Court of Appeals' decision is not presented as a question for this Court (Pet. i).

text of Part XI itself, *i.e.*, whether termination would substantially lessen competition or tend to create a monopoly (*see id.* at A15-A17).

The Court of Appeals then found that, although the District Court purported to "implicitly" consider whether termination would substantially lessen competition or tend to create a monopoly (Pet. App. A17-A18), the District Court had failed to apply the "standard framework" for analyzing the legality of mergers under this standard (*id.* at A19). Rather than apply "the current state of the law as prescribed by the Supreme Court, which circuit and district courts are bound to follow" (*id.* at A20), the District Court improperly relied upon "contemporary economic theory." Accordingly, the Court of Appeals remanded the case to the District Court for further proceedings consistent with its opinion.

REASONS FOR DENYING CERTIORARI

The petition should be denied because the holding of the Court of Appeals was correct and because it does not present an important question for resolution by this Court. The decision sought to be reviewed turned upon the Court of Appeals' interpretation of the meaning and effect of specific language in an unusual provision of a single antitrust consent decree and upon the nature of the specific findings of the District Court. Accordingly, as the Government itself states in opposing the petition, the Court of Appeals' decision does not have wide-ranging precedential value. Moreover, in concluding that the District Court erred in terminating Part XI of the consent decree, the Court of Appeals simply followed well-established precedent. Its decision does not in any way conflict with the holdings of this Court or any other court of appeals. Finally, because the Court of Appeals remanded the case to the District Court for further proceedings, this matter is in an interlocutory posture that does not justify Supreme Court review.

I. THE DECISION BELOW AFFECTS ONLY THE PARTICULAR CONSENT DECREE INVOLVED IN THIS CASE

The Court of Appeals' decision was based on the meaning and effect of the termination clause contained in Part XI of the consent decree in the Government's 1960 antitrust action against Cyanamid. Because termination provisions of the sort contained in the Cyanamid consent decree are extremely rare, the Court of Appeals' decision presents no question of general public importance for this Court's review.

In an effort to secure Supreme Court review, petitioner ignores the narrow basis of the Court of Appeals' decision and suggests that the decision establishes a broad, new standard for termination and modification of all consent decrees.[8] Clearly, however, the Court of Appeals' decision was explicitly based on the proper interpretation and application of the specific termination standard contained in the Cyanamid decree. The Court of Appeals itself recognized the narrow basis of its ruling when it stated the question before it: "whether the District Court erred in applying a 'public interest' standard to decide whether to terminate Part XI of the

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[8] Petitioner also raises several constitutional questions, *i.e.*, that there can be no judicial review of the parties' agreement to terminate the consent decree because (1) there is no case or controversy (Pet. 14-16) and (2) judicial review intrudes on the authority of the Executive Branch to conduct its own litigation (Pet. 18-19). Because these issues were not raised below, this Court should not consider them now. Moreover, these arguments are patently frivolous and, if accepted, would preclude *all* judicial review of *any* aspect of consent decree proceedings, contrary to established case law and the intent of Congress which enacted the Antitrust Penalties and Procedure Act, 15 U.S.C. § 16(b-h) (1982) to correct the practice of judicial rubber stamping of consent decrees. *See* H.R. Rep. No. 1463, 93d Cong., 2d Sess. 8 (1974). Significantly, the Government does not share petitioner's belief that the decision below presents a serious constitutional issue as to the Government's ability to conduct its own litigation (Gov. Br. 8 n.7).

decree which provided its own higher standard . . . ."[9] (Pet. App. A3).

The Court of Appeals' narrow textual ruling presents no question of general public importance. Consent decrees rarely contain special standards for modification or termination of the type at issue here.[10] The Antitrust Division has conducted a partial review of the over 1300 antitrust consent decrees currently in effect and discovered fewer than six decrees that contain termination standards "similar to the one in this case" (Gov. Br. 9).[11] Accordingly, the particular circumstances giving rise to the Court of Appeals' narrow, textually-based ruling are unlikely to be repeated and the Court's ruling is therefore unlikely to have significant precedential value. Thus, the Government, which is responsible for administering consent decrees, concludes that "the court of appeals' narrowly-based decision should not have a significant effect upon the government's authority to secure termination of antitrust decrees . . . ." (Gov. Br. 9). Cases de-

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[9] In opposing the petition, the Government recognizes that the "rationale" of the Court of Appeals' decision is "inseparable from the special standard contained in the . . . decree" and that the decision is therefore "limited to the unusual facts of this case" (Gov. Br. 9).

[10] Indeed, the exact standard contained in Part XI—which tracks the language of Section 7 of the Clayton Act—is, to MCI's knowledge, unique among antitrust consent decrees. Clearly, a termination provision that tracks Section 7 of the Clayton Act would never be found in decrees in such disparate areas of the law as taxation, securities regulation, civil rights and land and natural resources management, in which Cyanamid predicts the Court of Appeals' decision will have dire consequences.

[11] As Cyanamid itself acknowledges, the current "standard practice" in government antitrust consent decrees is now to provide that a decree terminate automatically after a period of years. Memorandum of Defendant American Cyanamid Company in Support of Its Motion For Termination of the Consent Judgment, August 6, 1982 at 11. As a result, it is unlikely that future decrees will contain special termination standards similar to that at issue here.

cided after the Court of Appeals' decision belie petitioner's claim that the Court's holding will have serious adverse consequences for the administration of antitrust consent decrees. As pointed out by the Government, none of the four government antitrust decrees that have been terminated by consent since the Court of Appeals' "narrowly-based decision" was affected by the Second Circuit's decision (Gov. Br. 9 n.9).

II. THE COURT OF APPEALS' DECISION WAS CORRECT AND DOES NOT CONFLICT WITH PRIOR DECISIONS OF THIS COURT OR ANY OTHER COURT OF APPEALS

A. The Court of Appeals Properly Interpreted the Requirement of Part XI

The express language of Part XI of the decree provides that termination requires a showing that it "will not . . . substantially . . . lessen competition or tend to create a monopoly in any line of commerce in any section of the country" (Pet. App. A81). On its face, this standard is unqualified and applies whenever termination of Part XI is sought. There is no exception or lower standard for termination sought with the Government's consent.

The Court of Appeals' construction of the meaning and effect of this provision was a straightforward application of the standards previously enunciated by this Court. Applying the rule that "the scope of a consent decree must be discerned within its four corners . . . and the instrument must be construed as it is written," *United States v. Armour & Co.*, 402 U.S. 673, 682 (1971), the Court of Appeals construed the text of this decree "as it is written." In doing so, the Court of Appeals properly found that Part XI "unambiguously" provides its own standard for termination or modification (Pet. App. A14). Because "[n]o provision has been made to apply a different standard where the govern-

ment joins with Cyanamid in a petition to terminate," the Court declined to apply a lower "public interest" standard urged by petitioner (*see id.* at A15). Significantly, despite its claim that the Court of Appeals' holding was clear error and contrary to the entire fabric of consent decree jurisprudence, petitioner cites no case in this or any other court which holds that it is improper for a court to apply the express and unqualified termination provision of a judicially sanctioned consent decree merely because the Government and the defendant subsequently believe a different standard should apply.

Petitioner argues that Part XI does not mean what it plainly says and that the parties intended the termination provision of Part XI to apply only when the Government does not consent to the proposed termination (Pet. 7 n.9).[12] However, this construction of the decree is contradicted by the unqualified language of Part XI and by the fact that other provisions in the same decree contain identical modification standards which explicitly provide an alternate standard for modification when the Government consents (*see* Parts XIII(B), (C), and (D) (Pet. App. A83-A84)). If the parties had intended the meaning urged by petitioner, "one can hardly think of less appropriate language . . . ." *United States v. Atlantic Refining Co.*, 360 U.S. 19, 22 (1959).

Petitioner also suggests that the Court of Appeals erred in applying the express textual standard in Part XI because, under principles of contract law, parties who have agreed to a consent decree ought to be free to modify its provisions at will. According to this argument, Part XI of the decree should have been terminated be-

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[12] Curiously, although it elsewhere castigates the Court of Appeals for going beyond the express language of the decree to analyze its purpose, petitioner's underlying claim that the termination provision of Part XI does not apply when the Government consents depends on its own *post hoc* interpretation of the purpose of the decree and the intent of the parties.

cause both petitioner and the Government agreed that termination was in the "public interest," even though they both effectively conceded that the express textual standard for modification had not been met.

However, as the Court of Appeals recognized, consent decrees are judicial acts, not simple contracts (Pet. App. A12). *See also United States v. Swift & Co.*, 286 U.S. 106, 115 (1932); *United States v. ITT Continental Baking Co.*, 420 U.S. 223, 236 n.10 (1975); *United States v. Swift & Co.*, 1975-1 Trade Cas. (CCH) ¶ 60,201 (N.D. Ill. 1975). Accordingly, a court is not required to modify or enter a decree simply because the parties ask it to. It was precisely to avoid such judicial "rubber stamping" that Congress enacted the Antitrust Penalties and Procedures Act. *See supra* note 8. Thus, the Court of Appeals was not required to apply a lower standard for termination than the one contained in Part XI simply because petitioner and the Government urged it to do so.

B. The Court of Appeals Properly Found That the District Court Erred in Terminating the Decree Under a "Public Interest" Standard

In reversing the District Court's decision terminating Part XI of the decree, the Court of Appeals also considered whether, in the specific context of the overall decree and the underlying statute, the District Court properly concluded that termination was in the "public interest." The Court of Appeals correctly noted that public interest "should be based on more than a broad and undefined criterion such as promotion of the public welfare" (Pet. App. A16). *Accord NAACP v. FPC*, 425 U.S. 662, 669 (1976); *United States v. Motor Vehicle Manufacturers Association of the United States*, 643 F.2d 644, 651 (9th Cir. 1981). As the Government urged below and recognizes here (Gov. Br. 6), the Court of Appeals found that the meaning of "public interest" derives "from the

purposes of the regulatory legislation," *NAACP v. FPC*, 425 U.S. at 699—[13] here, the Sherman and Clayton Acts.

In particular, the Court of Appeals correctly concluded that the statutory provision which underlies Part XI of the consent decree is Section 7 of the Clayton Act—the provision of the antitrust laws which deals with mergers and acquisitions. The petition does not—and cannot—dispute this conclusion. The purchase requirement of Part XI was designed to deny petitioner the anticompetitive benefits of its challenged acquisition of Formica without requiring the typical relief of divestiture. As the Government stated during earlier proceedings to modify Part XI, the purchase requirement of that provision "was designed . . . to deny to Formica the benefits which might accrue from vertical integration with Cyanamid" (C.A. App. 73). Under these circumstances, the Court of Appeals properly held that termination of Part XI was governed by reference to the standards for assessing the legality of acquisitions set forth in Section 7 of the Clayton Act, and specifically incorporated in the text of the decree, *i.e.*, whether termination would substantially lessen competition or tend to create a monopoly.[14]

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[13] The District Court's authority to enter a consent decree in the first place "comes only from the statute which the [consent] decree is intended to enforce." *System Federation No. 91, Railway Employees' Department v. Wright*, 364 U.S. 642, 651 (1961). Thus, "the adopting court is free to reject agreed-upon terms as not in furtherance of statutory objectives." *Id. See also United States v. Motor Vehicle Mfrs.' Ass'n of the U.S.*, 643 F.2d 644, 651 (9th Cir. 1981) ("parties may not enter into a consent judgment inconsistent with the statutory framework under which the action was brought").

[14] Petitioner contends that the Court of Appeals erred in looking at the "purpose" of Part XI. However, the entire basis of petitioner's argument that the decree should be terminated is that conditions in the melamine market have allegedly changed so dramatically since the entry of the Decree, that it no longer serves the "purpose" for which it was intended. Moreover, where there is a dispute concerning the construction of a decree, it is appropriate to consider

The Court of Appeals then found that although the District Court purported to determine whether termination of the consent decree would create a monopoly or lessen competition (Pet. App. A17-A18), the District Court failed to conduct the type of analysis necessary for an adequate factual determination of the competitive effect of terminating Part XI (*id.* at A19-A21). In place of applicable legal precedent concerning the competitive impact of a vertical acquisition, the District Court relied on "contemporary economic theory" that vertical integration "may enhance competition," citing a single economist who categorically asserted that "vertical mergers produce no anticompetitive effects" (*id.* at A37). Accordingly, the Court of Appeals correctly remanded the case for the District Court to apply the "standard framework of analysis" (*id.* at A19) for a vertical acquisition to determine whether the decree should be terminated.

III. CERTIORARI SHOULD BE DENIED BECAUSE OF THE INTERLOCUTORY NATURE OF THE JUDGMENT BELOW

Petitioner states that continuation of the decree is anticompetitive and implies that, unless review is granted, the decree will not be terminated. In fact, however, the Court of Appeals did not conclude that the decree should not be terminated. Rather, it remanded the case for further proceedings which would have to be undertaken whether or not this Court accepts the petition and reverses the Court of Appeals' decision with

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"the circumstances surrounding the formation of the consent order". *United States v. ITT Continental Baking Co.*, 420 U.S. 223, 238 (1975); *United States v. Swift & Co.*, 286 U.S. 106, 115 (1932) (where this Court looked at the "reasons" stated in the complaint); *United States v. Motor Vehicle Mfrs.' Ass'n of the U.S.*, 643 F.2d 644, 650 (9th Cir. 1981).

respect to the proper standard for termination of Part XI of the decree.[15]

Under the circumstances, denial of certiorari is appropriate in light of the longstanding principle that this Court "should not issue a writ of *certiorari* to review a decree of the Circuit Court of Appeals on appeal from an interlocutory order, unless it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause." *American Construction Co. v. Jacksonville, Tampa & Key West Railway*, 148 U.S. 372, 384 (1893). This Court has consistently adhered to this practice in later decisions. *See, e.g., Brotherhood of Locomotive Firemen v. Bangor & Aroostook Railroad*, 389 U.S. 327, 328 (1967) ("because the Court of Appeals remanded the case, it is not yet ripe for review by this Court"). *See also* R. Stern & E. Gressman, *Supreme Court Practice* ¶ 4.19 at 300 (5th ed. 1978).

Denial of the petition will not preclude later review of this case. In *Hamilton-Brown Shoe Co. v. Wolf Brothers & Co.*, 240 U.S. 251 (1916), for example, the Court rejected the argument that denial of certiorari from an interlocutory judgment precluded review of the questions decided by the interlocutory decision when the case was ultimately accepted after a second, final decision. The Court explained that "except in extraordinary cases, the writ is not issued until final decree" and the nonfinal nature of a decree is "a fact that of itself alone furnished sufficient ground for the denial of the application . . . ." *Id.* at 258. Petitioner has not presented

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[15] In a portion of the Court of Appeals' opinion which petitioner does not challenge, the Court of Appeals found that the District Court erred in concluding that, as a Court of Equity, it did not have the power to order a gradual phase-out of the purchase requirement of Part XI even though it found that immediate termination of that requirement would work a substantial and inequitable hardship upon MCI (Pet. App. A21). Thus, the District Court must conduct further proceedings on the method of termination even if its basic conclusion that the decree should be terminated is upheld.

any compelling or "extraordinary" reason for this Court to deviate from its usual practice of denying interlocutory review. The Court should refuse to accept review of the interlocutory judgment below.

CONCLUSION

For all the foregoing reasons, the petition should be denied.[16]

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Dated February 16, 1984

[16] The Government's suggestion, made in a footnote (Gov. Br. 10 n.10), that summary reversal is appropriate should also be rejected.

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No. 83-1085

In the Supreme Court of the United States

OCTOBER TERM, 1983

AMERICAN CYANAMID COMPANY, PETITIONER

v.

MELAMINE CHEMICALS, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

The government antitrust consent decree here at issue required the petitioner, a producer of melamine, to purchase from other producers a substantial amount of melamine each year, but provided that after ten years the petitioner could obtain relief from the purchase requirement, notwithstanding the objection of the government, by showing that such relief would not substantially "lessen competition or tend to create a monopoly in any line of commerce * * *." In this case, the petitioner did not seek relief over the opposition of the government; instead, both parties to the decree sought termination of the purchase requirement. In these circumstances, the question presented is:

Whether the court of appeals erred in applying the standard provided in the decree for situations where the defendant sought relief over the government's objection, rather than deferring to the parties' interpretation of the terms of the decree and to the reasoned judgment of the United States that termination of the decree would be in the public interest as defined by the antitrust laws.

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In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-1085

AMERICAN CYANAMID COMPANY, PETITIONER

v.

MELAMINE CHEMICALS, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A22) is reported at 719 F.2d 558. The opinion of the district court terminating the consent decree (Pet. App. A25-A46) is reported at 556 F. Supp. 361. The consent decree at issue here (Pet. App. A68-A86) was entered in August 1964 and is published at 1964 Trade Cas. (CCH) para. 71,166.

JURISDICTION

The judgment of the court of appeals was entered on October 5, 1983. The petition for a writ of certiorari was filed on January 3, 1984.[1] The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

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[1]The United States has been made a respondent in this case pursuant to Rule 19.6 of the Rules of this Court (see Pet. i).

STATEMENT

1. In 1960 the United States filed a complaint (Pet. App. A87-A99) against petitioner American Cyanamid Company (Cyanamid) alleging that it had violated Sections 1 and 2 of the Sherman Act, 15 U.S.C. 1 and 2, by participating in an international cartel that controlled the production of melamine, a substance used in the manufacture of high-pressure laminates and other plastic products. The complaint also alleged that Cyanamid's 1956 acquisition of Formica Company, a consumer of melamine, had violated Section 7 of the Clayton Act, 15 U.S.C. 18.

The lawsuit was settled in 1964 with the entry of a consent decree (Pet. App. A68-A86). Many of the decree's provisions have now expired or have been fully satisfied (*id.* at A7). The only provision of the decree now at issue is Section XI, which directs Cyanamid (*id.* at A81):

> to purchase annually from other producers of melamine (with the preference to United States producers) an amount of melamine for use by Cyanamid in the production of laminates in the United States * * *.

This provision, as a practical matter, requires Cyanamid to purchase large amounts of melamine from its chief competitor, respondent Melamine Chemicals, Inc. (MCI) (*id.* at A32). Section XI further provides, however, (*id.* at A81):

> that at any time after ten (10) years from [August 4, 1964] Cyanamid may petition to [the district] Court to be relieved from this provision, such relief to be granted upon a showing by Cyanamid to the satisfaction of [the] Court that the effect of such relief will not be substantially to lessen competition or tend to create a monopoly in any line of commerce in any section of the country.

2. By 1981, the melamine industry had undergone major changes, including two of prime import to this case. First, the traditional melamine manufacturing process—which Cyanamid and its co-conspirators controlled in 1964—has been completely displaced by a new process that is owned and licensed by a firm that was not involved in the pre-1964 cartel (see Pet. App. A7). Second, Cyanamid is no longer the sole source of melamine for domestic users; today, there are two large domestic manufacturers of melamine—Cyanamid and MCI—and numerous foreign manufacturers that sell melamine in the United States (see *id.* at A36, A40).

3. Citing these changed economic circumstances, Cyanamid requested that the United States consent to termination of all provisions of the final judgment remaining in effect. In particular, Cyanamid argued that the melamine purchase provision now imposed upon it the anticompetitive requirement of subsidizing its strongest competitor, MCI. After a lengthy investigation by the Antitrust Division, the United States tentatively concluded that the decree had become anticompetitive and should be terminated.

On August 5, 1982, Cyanamid moved in the district court for termination of the decree, and the United States filed a memorandum that explained why it had tentatively consented to termination (*id.* at A55-A67). Following a 60-day period for public comment, the United States filed a detailed response to the three comments that had been submitted, and informed the district court that it had come to the firm conclusion that the public interest required termination of the decree (C.A. App. 191-205).

MCI and another company were allowed to intervene in the district court, over the objections of the government and Cyanamid (Pet. App. A47-A54). MCI argued that Section XI of the decree could be terminated, by its terms, only if

Cyanamid proved that termination would not "substantially * * * lessen competition or tend to create a monopoly"—the standard set forth in Section 7 of the Clayton Act. MCI contended also that Cyanamid could not discharge that burden.

The district court ruled that the decree had become anticompetitive and should be terminated (Pet. App. A25-A46). The court rejected intervenor MCI's attempt to apply the Clayton Act standard to situations other than unilateral efforts at modification. Since both the government and Cyanamid had consented to termination, the court held instead (*id.* at A34) that the appropriate legal standard for approving termination was whether such a result was "in the public interest," as expressed in the competitive policy articulated in the antitrust laws. After a detailed discussion of the evidence and the contentions of the parties, the district court found that (1) significant changes had occurred in the melamine industry since the decree was entered (*id.* at A31-A33); (2) as a result of those changes the melamine purchase provision had become anticompetitive on balance under both the "public interest" and the Clayton Act standards[2] (see *id.* at A35-A40); and (3) the arguments made by MCI and others concerning alleged adverse consequences of termination were unfounded (*ibid.*). Finally, the district court concluded that termination was in the public interest and should take effect immediately (*id.* at A39-A45).

4. The court of appeals reversed. It concluded that both the language of Section XI of the decree and the "purpose of the provision in the overall context of the judgment" (Pet. App. A14) established that the appropriate standard for termination was not the usual public interest standard, but

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[2]Although the district court had ruled that the Clayton Act standard was not applicable, its analysis, in effect, included the factors that would be relevant to a Section 7 case.

the "higher" Clayton Act standard set forth in Section XI—regardless of the government's consent to termination (*id.* at A12-A17). The court emphasized that "[n]o provision has been made to apply a different standard where the government joins with Cyanamid in moving to terminate the consent decree" (*id.* at A15).

The court of appeals then concluded (Pet. App. A20-A21) that the district court had given inadequate consideration to Section XI's special Clayton Act standard because the lower court's discussion had fallen short of the "standard framework of analysis" required in Section 7 merger cases by *Brown Shoe Co.* v. *United States*, 370 U.S. 294 (1962), and *Fruehauf Corp.* v. *FTC*, 603 F.2d 345 (2d Cir. 1979). The court remanded the case to the district court "to apply the factors for analyzing the legality of a vertical merger set forth by *Brown Shoe*, *Fruehauf*, and other applicable cases, and to make findings of fact as to the current state of the melamine market and the market for products that contain melamine" (Pet. App. A21).[3]

DISCUSSION

The court of appeals erred in holding that the standard provided in Section XI of the decree applies notwithstanding the government's consent to termination of the judgment, and in rejecting as inadequate the district court's analysis of the competitive consequences of termination. While the judgement below is clearly incorrect, the court of appeals' decision presents no sharply defined legal issue of sufficient importance to warrant plenary review by this Court, especially in the present interlocutory posture of the

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[3]The court of appeals also ruled that if on remand the district court should find that termination was appropriate under the special Clayton Act standard, it "should exercise its equitable power to determine an appropriate duration" for a gradual phase-out of the melamine purchase provision. Pet. App. A21.

case. The decision construes specific language that appears in only a few government antitrust consent decrees, and rests upon the specific nature of the district court's findings in this case. Moreover, the decision does not directly conflict with any decision of this Court or any other court of appeals.

1. The Executive Branch bears the primary responsibility for "protecting the public interest" under the antitrust laws. *United States* v. *Borden Co.*, 347 U.S. 514, 518 (1954). Accordingly, it possesses the concomitant prosecutorial discretion to institute or to refrain from instituting an enforcement action. See, *e.g.*, *Confiscation Cases*, 74 U.S. (7 Wall.) 454, 458-459 (1869); *United States* v. *Cox*, 342 F.2d 167, 171 (5th Cir.), cert. denied, 381 U.S. 935 (1965). Once it files an antitrust suit the government may settle the suit by consent decree, so long as the settlement serves the "public interest."[4] The judicial "public interest" determination takes its meaning from the statutes underlying the litigation, *NAACP* v. *FPC*, 425 U.S. 662, 669 (1976); in this case, the antitrust laws are the relevant legislation, and "the policy unequivocally laid down by [those statutes] is competition." *Northern Pac. Ry.* v. *United States*, 356 U.S. 1, 4 (1958).

Where a defendant moves to modify or terminate an antitrust decree over the government's objection, the defendant must prove that any post-decree changes in the industry

> are so important that [the anticompetitive] dangers, once substantial, have become attenuated to a shadow * * *. Nothing less than a clear showing of grievous wrong evoked by new and unforeseen conditions should lead [a court] to change what was decreed * * *.

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[4] *E.g.*, 15 U.S.C. 16(e); *United States* v. *American Telephone & Telegraph Co.*, 552 F. Supp. 131, 147 n.67 (D.D.C. 1982), aff'd *sub nom. Maryland* v. *United States*, No. 82-952 (Feb. 28, 1983).

United States v. *Swift & Co.*, 286 U.S. 106, 119 (1932) (*Swift*). This strict standard is appropriate and necessary in order to protect the government from having to prove anew its original case, years after entry of a decree, each time a defendant moves to modify or terminate an antitrust judgment. If the rule were otherwise, private parties, and not the government, would have control over the use of the public's resources for antitrust enforcement.

Where the government has consented to motions to modify or terminate consent decrees, however, the courts have judged the reasonableness of such actions under the same "public interest" standard that is applied when a decree is originally proposed.[5] The courts have not—except in this case—required a determination whether the allegations of the original complaint continue to be valid at the time of the motion for termination. Instead, where the United States has consented to termination and offered a reasoned explanation why such a course would vindicate the public interest in free competition, and there is no showing of government bad faith or malfeasance, courts properly defer to the government's judgment. See, *e.g.*, *Sam Fox Publishing Co.* v. *United States*, 366 U.S. 683, 689 (1961); *United States* v. *Bechtel Corp.*, 648 F.2d 660, 666 (9th Cir.), cert. denied, 454 U.S. 1083 (1981).[6]

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[5] *E.g.*, *United States* v. *Swift & Co.*, 1975-1 Trade Cas. (CCH) para. 60,201, at 65,702 (N.D. Ill. 1975); *United States* v. *General Electric Co.*, 1977-2 Trade Cas. (CCH) para. 61,659, at 72,717 (E.D. Pa. 1977).

[6] Cf. *United States* v. *Borden Co.*, 347 U.S. at 519 ("[i]t is • • • clear that Congress did not intend that the efforts of a private litigant should supersede the duties of the Department of Justice in policing an industry"); *Buckeye Co.* v. *Hocking Valley Co.*, 269 U.S. 42, 48-49 (1925). Over the years, federal courts have approved hundreds of consent orders modifying or terminating government antitrust decrees.

In this case, the court of appeals not only failed to defer to the government's judgment that termination of the decree would be in the public interest, but it also imputed to the government and Cyanamid a reading of Section XI that is inconsistent with rational decision-making by the parties at the time the decree was entered. Neither party would have imposed on itself the unnecessary burden of proving, at a later date, that a violation of the Clayton Act would *not* result from an action its adversary was willing to accept. Given the strictness of the *Swift* standard for unilateral modification of a decree by an antitrust defendant, the purpose of the Clayton Act language in Section XI of the decree is clear, as the district court found (Pet. App. A34). The insertion of that special standard simply permitted Cyanamid to obtain modification of the melamine purchase provision, *over the government's objection*, pursuant to a less onerous standard than *Swift* otherwise would have required. The court of appeals thus misinterpreted Section XI's purpose and intended effect; the Section XI standard is simply not applicable where both parties agree to change the decree.

2. If we shared petitioner's concern that the court of appeals' erroneous decision might have broad precedential effect (Pet. 9-13), we would urge this Court to grant the petition.[7] If termination of an antitrust decree by mutual consent of the parties were indeed generally to be conditioned on proof that the allegations of the original complaint

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[7]Petitioner also argues that the Constitution precludes judicial review of the parties' agreement to terminate the decree because (1) there is no genuine case or controversy (Pet. 14-16); and (2) such review intrudes upon the constitutional authority of the Executive Branch to control its own lawsuits, which includes the power to dismiss them (Pet. 18-19). Considering, however, that petitioner did not raise these arguments below, and that the order of the court of appeals is not a final judgment, the United States believes that these contentions do not warrant this Court's review at this time.

were no longer true, fewer outdated decrees would be terminated; as a result, competition would be adversely affected and antitrust defendants would be less willing to enter into consent decrees in the first place.

In our view, however, petitioner overstates the effect of the court of appeals' decision, which is limited to the unusual facts of this case. The rationale of the decision is inseparable from the special standard contained in the Cyanamid decree: as the court itself saw the case, the issue was "whether the district court erred in applying a 'public interest' standard to decide whether to terminate Part XI of the decree which provided its own higher standard, simply because the government consented to the termination" (Pet. App. A3). Thus, the court of appeals explicitly based its decision on the particular, and unusual, language of this decree (see *id.* at A12-A17).

There are approximately 1300 antitrust consent decrees now in effect.[8] The Antitrust Division has recently reviewed more than 350 of these decrees and has found fewer than six that contain special termination standards similar to the one in this case. Accordingly, the court of appeals' narrowly-based decision should not have a significant effect upon the government's authority to secure the termination of antitrust decrees when and if they become anticompetitive.[9]

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[8]See Statement of William F. Baxter Before the Subcomm. on Monopolies and Commercial Law of the House Comm. on the Judiciary, 98th Cong. 1st Sess. Mar. 10, 1983, p. 15.

[9]Indeed, four government antitrust decrees have been terminated by consent since the court of appeals' decision—three of them over substantial opposition by third parties—on the basis of the usual "public interest" standard. *United States* v. *Rohm & Haas Co.*, Civ. No. 9068 (E.D. Pa. Dec. 21, 1983); *United States* v. *Safeway Stores, Inc.*, Civ. No. CA4-3173 (N.D. Tex. Nov. 30, 1983); *United States* v. *American Can Co.*, Trade Reg. Rep. (CCH) para. 65,773 (N.D. Cal. Nov. 1, 1983); *United States* v. *Continental Can Co.*, Civ. No. 26346-WWS (N.D. Cal. Oct. 31, 1983). None of these decrees contained a special termination standard.

And while the continuation of this decree will have an altogether unjustified anticompetitive effect on the melamine industry, the significance of that effect is not great enough by itself to warrant this Court's plenary consideration — particularly in light of the possibility that the proceedings on remand may still result in termination of this decree.

CONCLUSION

The petition for a writ of certiorari should be denied.[10]

Respectfully submitted.

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JANUARY 1984

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[10]In view of the clarity of the court of appeals' error and the anticompetitive nature of the result, the Court may wish to consider summary reversal. See *Catalano, Inc.* v. *Target Sales, Inc.*, 446 U.S. 643 (1980).

No. 83-1085

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

AMERICAN CYANAMID COMPANY,
Petitioner,

—against—

MELAMINE CHEMICALS, INC. *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONER AMERICAN CYANAMID COMPANY

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONER AMERICAN CYANAMID COMPANY

Petitioner American Cyanamid Company ("Cyanamid") submits this reply brief in response to the briefs filed by Respondent Melamine Chemicals, Inc. ("MCI") and the Justice Department in connection with Cyanamid's petition for a writ of certiorari.[1]

REPLY TO RESPONDENTS' ARGUMENTS

At the urging of a non-party competitor, which seeks to perpetuate a fortuitous subsidy under a twenty-year-old Government antitrust consent decree, the Second Circuit reversed the judgment of the district court terminating that decree. The issue now before this Court is whether the Second Circuit's decision to reinstate the decree over the wishes of both parties to it, and in the

1. Cyanamid's Rule 28.1 statement contained in its original petition remains accurate.

face of the district court's reasoned conclusion that changed circumstances have caused the decree to become harmful to competition, presents sufficiently well-defined and important legal issues to warrant this Court's consideration.

In its petition, Cyanamid showed that the question raised—the proper scope for judicial inquiry when the parties jointly seek to modify or eliminate a consent decree—is an important and recurring one. Cyanamid also showed that in answering that question the Second Circuit held that the absence of conflict between the parties obliges the court to adjudicate liability under the original complaint, thereby creating by judicial fiat a new and Constitutionally unauthorized quasi-adversarial proceeding.

In their papers opposing the petition, both respondents have contended that the decision below turns on certain language peculiar to this consent decree, and is therefore too narrow to justify review by this Court. We show here that both the broad language used by the court of appeals and the result it reached belie respondents' efforts to narrow its application to the facts of this case.

I

The Decision Below Cannot Reasonably Be Narrowed As Respondents Urge.

The Government agrees with Cyanamid that the decision below is clearly erroneous; it differs only as to the scope of the precedent that has been set. It is perfectly understandable that the Government would hope that this decision will not be found generally applicable to joint motions to terminate or modify consent decrees. It has presumably taken that position in other district court proceedings subsequent to the Second Circuit opinion (Brief For the United States, hereinafter "U.S. Brief," at 9, n. 9) and would of course wish to continue to do so if this petition were denied. However, such considerations, understandable though they may be, do not lead to a correct description of what the court below has done in this case.

A. The Second Circuit Explicitly Decided The Case In Terms Of Broad Application.

In arguing that the court of appeals' decision rests only upon a provision in the decree itself, respondents either ignore or seek to brush aside that portion of the opinion (at pages A15-17) where the court holds in unambiguous terms that although Supreme Court consent decree decisions have "tended to apply principles of contract law," those precedents should not control where the parties are in agreement (A12-13). It flatly stated:

> [I]t is appropriate for the court to look beyond the words of the decree itself in situations such as this, where the parties jointly seek a modification of the decree.

(A15-16).

Having thus decided that the standard of review applicable to a modification motion may be found outside the language of the decree, the court of appeals ruled that "the criteria used for determining a Clayton Act violation are applicable here" (A17). This conclusion followed, in the view of the Second Circuit, because "the purpose of Part XI" was to address the Government's Clayton Act concerns (A17). In other words, the court held that because the relief in Part XI related to an alleged Section 7 violation, the mandatory annual purchases could not later be terminated on consent of the parties until it is determined whether any Section 7 violation exists. The district court's assessment of the present-day competitive effect of that remedy was held to be insufficient because it did not include a detailed legal analysis as though the court had presided over the trial of a Section 7 case (A17-21).

The court of appeals' reasoning in this portion of its opinion is indistinguishable from the "purposes of the decree" approach this Court emphatically rejected in *United States* v. *Armour & Co.*, 402 U.S. 673 (1971). Thus, the Second Circuit has simply resurrected an old mistake, which this Court should again set to rest. The modification or termination on consent of an old decree, even the entry of which is a discretionary act, should be no

occasion for the courts to create a new type of adjudicative proceeding.

MCI's contention, that Cyanamid's arguments would limit the court's role to that of a "rubber stamp" or render the Antitrust Procedures and Penalties Act ("APPA"), 15 U.S.C. §§ 16 (b-h) (1982), unconstitutional (Brief In Opposition submitted by MCI, hereinafter "MCI Brief," at 8, n. 8), is incorrect. Cyanamid maintains only that whatever the proper role for the court may be in ruling on a joint motion to terminate or modify a decree, it is plain error to impose an adjudicative standard that is qualitatively different from and more demanding than that of the APPA. As we have already pointed out, hundreds of decrees have been modified or terminated under the approach followed by the district court in this case (petition at 9-12). Although the APPA does not apply here, both the Government and the district court determined to treat this matter in accordance with the standards and procedures required by that statute, which they unquestionably fulfilled. No more should be required.[3]

2. The nature of the remand proceedings mandated by the Second Circuit illustrates the perversity of its ruling. Since both the Government and Cyanamid agree that the decree is anticompetitive and should be terminated, on remand MCI will presumably seek to assume the role of prosecutor in support of the continuation of this decree, with the Government and Cyanamid in opposition.

3. In fact, the Constitutional issues are more pointed in this context than when the court is asked to enter a new consent decree (petition at 19). In that situation, the Government is invoking judicial processes in aid of its enforcement decision. Consequently, a court may more properly refuse to put its imprimatur on a proposed new decree that it considers to be the product of impropriety or inadequate consideration, so long as it does not intrude on the prosecutorial discretion of the Executive Branch. On the other hand, when the Government moves to terminate a decree it no longer considers deserving of enforcement, a court that refuses to terminate must either direct the Government to continue to police compliance with the decree or itself assume the prosecutorial function—in either case an affirmative invasion of the Executive Branch's role.

B. The So-Called "Narrow" Holding That Courts May Disregard The Parties' Understanding Of Their Own Consent Decree Is Itself A Ruling Which Warrants This Court's Attention.

Even if the court of appeals had, as respondents contend, rested its decision entirely on an interpretation of Part XI of this decree, its handling of that provision demonstrates the breadth of its holding, not its narrowness.

As noted, only MCI attempts to justify the appellate court's outright rejection of the interpretation of that provision urged by the parties who drafted it and found by the district court to be factually correct.[4] Both Cyanamid and the Government have repeatedly explained—to the district court, to the court of appeals and to this Court—that the drafters of the decree recognized the difficulty of modification at the sole request of the defendant under the standard set out in *United States* v. *Swift & Co.*, 286 U.S. 106 (1932), and therefore agreed upon a *special standard* to apply in the event of Cyanamid's *unilateral* application.[5] However, at MCI's urging, the Second Circuit construed the termination language of Part XI as preclusive, making the so-called

4. MCI's tortured textual analysis of the decree is wrong at every turn. First, the proviso in question simply does not say, as MCI baldly insists, that relief from the purchase requirement may "only" be granted if Cyanamid makes the specified showing (MCI Brief at 3). The actual language requires termination upon a certain showing by Cyanamid, but does not preclude relief on other bases, or speak at all to the standard applicable when both parties seek to end the entire decree pursuant to Part XV. No provision, other than Part XV (in which the court was given continuing jurisdiction to modify or terminate) could conceivably have been thought necessary for what the parties now seek.

Furthermore, MCI's reference to other provisions of the decree, in Part XIII, is misleading and inaccurate. Those are not, as MCI asserts, "modification" clauses at all (MCI Brief at 11). Unlike Part XI, those sections have nothing to do with changing or ending the decree, but merely provide a mechanism for Cyanamid to make certain otherwise prohibited acquisitions without resort to the court. If the Government gave its consent to a particular acquisition under Part XIII, the provision itself would remain in effect.

5. The parties' account of their intent in drafting Part XI as they did is not only consistent with the language they used, it is consistent also with the advice of what was, in 1964, the leading commentary on consent decree practice:

Section 7 standard set forth therein the sole basis for terminating the purchase requirement, even where both parties seek relief from the entire decree.

The substitution of a new decree interpretation at the appellate level is precisely what this Court forbade in *United States* v. *Atlantic Refining Co.*, 360 U.S. 19, 23-24 (1959), where it stated:

> We . . . hold that where the language of a consent decree in its normal meaning supports an interpretation; where that interpretation has been adhered to over many years by all the parties, including those government officials who drew up and administered the decree from the start; and where the trial court concludes that this interpretation is in fact the one the parties intended, we will not reject it simply because another reading might seem more consistent with the Government's reasons for entering into the agreement in the first place.

Thus, even as respondents would construe the Second Circuit's ruling, it is directly in conflict with consent decree law as enunciated by this Court.

Respondents try to minimize the importance of the decision by focusing on the allegedly unusual nature of the provision at issue. That is not the relevant inquiry, however, for the court of appeals' *de novo* approach to decree interpretation was not limited to modification provisions and therefore would apply equally to any provision of any decree that might come before a district court. To illustrate, under the Second Circuit's rationale, the district court in *United States* v. *Armour & Co., supra*, would have been free on its own motion or at the request of a third-party to expand that decree's prohibition on engaging in certain lines of business,

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> The reported cases . . . indicate rather strongly that, *absent special language establishing more liberal standards than are implicit in the usual retention-of-jurisdiction clause*, neither plaintiff nor defendant in an antitrust case can realistically expect to achieve the *unilateral modification* of a consent decree.

Dabney, Antitrust Consent Decrees: How Protective An Umbrella?, 68 YALE L.J. 1391, 1396-97 (1959) (footnotes omitted, emphasis added). *See also*, Donovan and McAllister, Consent Decrees In The Enforcement Of Federal Anti-Trust Laws, 46 HARV. L. REV. 885 (1933).

even though it could not do so at the urging of the Government. Similarly, by the reasoning of the decision below, the calculation of dividends under the consent decree in *United States* v. *Atlantic Refining Co., supra*, or the issue of whether a voting trust was permissible under the decree in *Hughes* v. *United States*, 342 U.S. 353 (1952), would turn, not on the intent of the parties or the language of the decree itself, but on a court's independent views of how best to effectuate the law enforcement "purposes" of the original litigation.

In short, even the purportedly narrow construction of the decision below urged by respondents blunts neither of the two justifications Cyanamid has already advanced for granting certiorari. For a court to "construe" a decree provision as to which the parties have no dispute both contravenes the Constitution's case and controversy limitation on Article III jurisdiction and denies the contractual essence of the decree. As already shown, it is also improper on both of those scores to require the parties to litigate a case they settled by consent years ago. These arguments have met with no answer from the respondents, and clearly deserve this Court's attention.[6]

II

The Decision Below Is Not Interlocutory With Respect To The Issues Presented On This Petition.

Both respondents suggest that review may be premature because the Second Circuit's decision is interlocutory and, "proceedings on remand may still result in termination of this decree" (U.S. Brief at 10). The point is not well taken. The precedents

6. The suggestion that Cyanamid's Constitutional arguments were not raised below is curious indeed. While that contention, even if true, would not be grounds for denying review of a Constitutionally defective jurisdictional decision, Cyanamid has in fact argued at every level that a joint request to terminate a consent decree does not place the original complaint in issue and that the Government's support for the request is entitled to great weight. *See, e.g.*, Brief for Defendant-Appellee and Cross-Appellant American Cyanamid Company, as submitted on the appeal to the Second Circuit, at 15-20, Argument I.

are clear that this Court will review an interlocutory decision on an important issue of law that is fundamental to the further conduct of the case. *Catalano, Inc.* v. *Target Sales, Inc.*, 446 U.S. 643 (1980); *Gillespie* v. *United States Steel Corp.*, 379 U.S. 148 (1964); *United States* v. *General Motors Corp.*, 323 U.S. 373 (1945). The issue presented here is clearly important for the reasons discussed at 8-19 of the petition, and it is hard to imagine a decision more fundamental to the further conduct of the case. The Second Circuit has directed the district court to define the relevant markets and "to apply the factors in *Brown Shoe*, *Fruehauf*, and other applicable cases" (A21). The summary of those factors in the court's opinion (A19) clearly indicates the burdensome scope of the proceeding that has now been ordered.

The *Catalano* case is squarely in point. There, this Court reviewed and reversed summarily an interlocutory court of appeals' ruling that a horizontal agreement on credit terms was subject to a "rule of reason" analysis rather than a rule of *per se* illegality, even though the agreement might have been found unlawful on remand after an exploration of all the facts pertinent to a rule of reason analysis.

The ruling below is final and ripe for review in every meaningful sense. The issue of what standard should apply when both parties urge termination of a consent decree is intrinsically a threshold question that has now been decided and will not likely be revisited on remand. *See Cohen* v. *Beneficial Loan Corp.*, 337 U.S. 541 (1949). *See also Abbott Laboratories* v. *Gardner*, 387 U.S. 136 (1967); *Marshall* v. *Occupational Safety & Health Review*, 635 F.2d 544 (6th Cir. 1980). Review by this Court can bring this matter—already pending for so many years—to a prompt close.

III

As The Government Suggests, The Clear Error Of The Decision Below Warrants Summary Reversal.

Finally, the Government has suggested summary reversal (U.S. Brief at 10, n. 10). Cyanamid concurs, because the decision of the Second Circuit—in requiring adjudicative proceedings, in rejecting the parties' interpretation of their own decree provisions and in adopting a new interpretation that is contrary to

the parties' original intention—embodies clear legal error of the type that has given rise to summary reversal in the past. *See, e.g., Central Trust Co.* v. *Creditors' Committee*, 454 U.S. 354 (1982) (summary reversal granted where the Second Circuit adopted an exception to the Bankruptcy Reform Act of 1978 which was a "wholly judicial creation"); *N.L.R.B.* v. *Brandman Iron Co.*, 368 U.S. 399 (1962) and *N.L.R.B.* v. *Las Vegas Sand & Gravel Corp.*, 368 U.S. 400 (1962) (summary reversal of Sixth and First Circuit decisions which, *sua sponte*, re-worded the terms of two separate consent decrees); *Shenandoah Valley Broadcasting, Inc.* v. *ASCAP*, 375 U.S. 39 (1963) (summarily reversing a Second Circut ruling, on a matter arising under the ASCAP antitrust consent decree, because that ruling ignored a prior decision of this Court on the same issue).

CONCLUSION

For the reasons stated herein and in the petition for a writ of certiorari, Cyanamid respectfully urges that the Court either grant the writ or reverse summarily.

Dated: February 23, 1984
New York, New York

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